The ACA's "Play or Pay" Mandate: Avoiding Exposure To Workforce Realignment and Whistleblower Claims

October 2014

Robert C. Hinton
Connecticut Law Tribune

Many employers are contemplating cutting their workforce mix to minimize costs under the Affordable Care Act ("ACA") due to one of the most controversial provisions of the ACA: Section 1513, informally known as the "Play or Pay" mandate. This provision applies to "large" employers, defined as employers with 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 large employers offer affordable, employer-sponsored health coverage to their full-time employees and their employees' children, or possibly face the payment of penalties to the IRS. The "Play or Pay" mandate will be enforced beginning on January 1, 2015. Therefore, there is precious little time for large employers to develop strategies to minimize their exposure under this mandate.

One approach that employers are considering to try to avoid the "Play or Pay" mandate 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". Another approach being considered is to cap the number of hours worked by part-time employees to ensure that they do not work more than thirty hours per week. However, employers considering these options must proceed with caution because they may create unexpected legal exposure under the Employee Retirement Income Security Act of 1974 ("ERISA").

According to a U.S. Department of Labor Fact Sheet, ERISA governs approximately 2.5 million health benefit plans sponsored by private sector employers nationwide providing health care benefits to some 137 million Americans. One of ERISA's protections is Section 510, entitled "Interference with Protected Rights." This Section protects participants and beneficiaries of employment benefit plans from losing their protected ERISA rights through an adverse employment action.

The ACA's "Play or Pay" Mandate: Avoiding Exposure To Workforce Realignment and Whistleblower Claims

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 an adverse employment action to interfere with a plan participant's rights under an ERISA-covered employee benefit plan.

With the implementation of the ACA, the battle lines for future claims under ERISA Section 510 are already being etched out. Employees and the Internal Revenue Service, are likely to challenge workforce realignments, including, but not limited to, a change in employee status from full to part-time employment or any other act that results in employees working less hours. And the IRS can look back to the prior 12 months to determine whether or not an employee has full-time status.

The IRS or an individual claimant will allege that an employer's decision to reduce hours or the number of employees was either in retaliation for an employee's exercising rights under the plan or intended to interfere with an employee's attainment of rights under the plan. Employers will need to demonstrate that their 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.

ERISA Section 502 (a)(3) provides the successful Section 501 litigant with "appropriate equitable relief," which may entitle the employee to the health care benefits the employee would have received as a full-time employee, as well as other equitable forms of relief.

It is virtually certain that ERISA Section 510 claims will be on the rise with the implementation of the ACA and employers' decisions to reduce employee hours, whether to minimize cost under the ACA or for any other reason. The bottom line is that employers will expose themselves to legal exposure if they cut their workforce below 50 employees or use the cut-in-hours approach in order to try to escape 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, or because the employee reported an employer's potential violations of the ACA. Section 1558, 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 or received any other ACA benefit. Thus, an employee who has received a subsidy under the ACA, and, for example, has his work hours subsequently reduced by the employer, can assert that the reduction constitutes "adverse action" by the employer because of the receipt of the subsidy. Moreover, an employee who believes that he or she has been discharged or otherwise discriminated against in violation of the ACA may file a complaint with

PULLMAN &COMLEY

The ACA's "Play or Pay" Mandate: Avoiding Exposure To Workforce Realignment and Whistleblower Claims

the Occupational Health & Safety Administration within 180 days of the adverse action. Violations of the ACA's whistleblower provisions may result in reinstatement with back pay and interest and other compensatory damages. 29 CFR Part 1984.

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. Employers should undertake a thorough analysis before reducing or realigning their workforce in order to ensure that they can demonstrate a legitimate business reason for taking such action and in order to avoid the play-or-pay penalty, or a retaliation claim by an employee. Given the risks involved, employers should consult with legal counsel before taking any action actually intended to avoid the ACA's coverage.

Robert Hinton is a partner with Pullman & Comley, LLC. His practice is focused on commercial litigation, including ERISA litigation. Bob is admitted in both Connecticut and New York, and may be reached at rhinton@pullcom.com.