

Workforce Restructuring to Avoid ACA Penalties may be ERISA Violation

March 9, 2016

Dave and Busters, Inc. (**D&B**) began restructuring its workforce in 2013 to reduce the number of employees who were considered full-time under the Affordable Care Act (the **ACA**), thus minimizing D&B's potential exposure to the employer shared responsibility payments under the ACA. Part of this well-documented reduction strategy included shifting many employees who had previously worked full-time schedules into part-time positions, which also resulted in a loss of eligibility under D&B's group medical plans. In a class action filed against D&B, the plaintiffs maintain that D&B violated ERISA Section 510 because it engaged in unlawful discrimination against a participant or beneficiary for exercising any right to which he or she is entitled under the provisions of an employee benefit plan subject to ERISA. The defendant countered that future ineligibility for coverage alone was not enough to sustain a violation under ERISA Section 510. The U.S. District Court (S.D.N.Y.) noted that the plaintiff had also lost her then current eligibility under the plan, denied D&B's motion to dismiss, and made the following statement: "Plaintiff has sufficiently pled that the employer acted with an 'unlawful purpose' when taking an adverse action against her." It remains to be seen if the plaintiffs will ultimately prevail against D&B. The take-away is that employers exploring workforce restructuring to limit potential liability under the ACA should consider demonstrating other significant business reasons to limit their exposure to a similar suit. The order denying D&B's motion to dismiss can be found [here](#).