ERISA and ACA Litigation Update

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ERISA and ACA Litigation Update

- What We'll Cover:
  - Workforce Management after *Marin v. Dave & Buster's Inc.*
    - Pay or Play Penalty Requirements
    - ERISA §510
    - *Marin v. Dave & Buster's Inc.* (Southern District of New York)
  - ERISA Preemption
    - ERISA Preemption under §514
    - Review of Past Supreme Court Decisions
    - *Gobeille, Chair of the Vermont Green Mountain Care Board v. Liberty Mutual Insurance Co.* (Supreme Court)

Employer "Pay or Play" Penalty – Who Can Be Subject?

- Applicable Large Employers (ALEs)
  - Average of 50 or more full-time equivalents (FTEs) on business days in prior calendar year
  - Special rules for a controlled group
- Formula: FT employees (including seasonal) for each month + FTEs (including seasonal) for each month ÷ 12
  - FT employee = average of at least 30 hours of service per week (or 130 hours/month)
  - Number of FTEs for month = total hours worked by non-FT employees (not more than 120 for any one employee) ÷ 120 (rounding down if a fraction)
  - *Exception for Seasonal Workers*: If employer's workforce exceeds 50 FT employees for 120 or fewer days during the year and employees in excess of 50 employed in that period were seasonal = NOT an ALE

Employer Pay or Play Penalty – What are the Penalties?

- Penalty is triggered, in general, if FT employee is certified as enrolled for Exchange subsidy for a month
- §4980H(a) penalty applies if employer
  - Failed to offer substantially all FT employees (and dependents) opportunity to enroll in ESP for a month
  - Monthly penalty = $2,000 x # of FT employees minus 30 ÷ 12
  - FT Employee – an employee who has, on average, at least 30 hours of service per week (or at least 130 hours per calendar month)
  - "Substantially all" – 95% of FT employees or, if greater, 5 FT employees
    - Must offer "effective opportunity" to enroll or decline enrollment at least 1 x year
  - Must include "dependents" (i.e., children up to age 26)
    - Spouses need not be included

Employer Pay or Play Penalty – What are the Penalties?

- §4980H(b) penalty applies if employer
  - Offered substantially all FT employees (and dependents) opportunity to enroll in ESP for a month, but coverage is not affordable or fails to provide minimum value (MV)
  - Monthly penalty = lesser of:
    - $2,000 x # of FT employees minus 30 ÷ 12 OR
    - $3,000 x # of FT employees with subsidy ÷ 12
  - If affordable coverage that offers MV is offered to all FT employees (and children to age 26), no penalty possible
  - MV = Plan's share of total allowed costs of benefits provided under the plan must be at least 60% of such costs
  - Affordable = Employee cost for self-only coverage in lowest-cost MV plan ≤ 9.5% of household income

“Workforce Management”

- Recap: Employer with more than 50 FT employees must either provide affordable/MV coverage to FT employees or pay a penalty
- Can an employer “manage” its workforce so as to reduce the number of FT employees to whom coverage must be offered, to save money and to either directly or indirectly avoid ACA’s coverage obligations?
  - No specific prohibition in employer shared responsibility regulations except with respect to use of temporary staffing agencies

"Workforce Management" ERISA §510

- ERISA §510 prohibits taking any adverse employment action for the purpose of interfering with benefits
  - "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…."
  - How and why an employer "manages" employee's hours may prove crucial under ERISA §510

"Workforce Management"
Marin v. Dave & Buster's Inc.

- *Marin v. Dave & Buster's* (S.D.N.Y.) – class action complaint under ERISA §510 on behalf of approximately 10,000 current and former Dave & Buster's employees
  - Participants in an ERISA-covered health insurance plan sponsored by Dave & Buster's (D&B)
  - Hours were involuntarily reduced following enactment of ACA
  - Allegedly suffered either loss of insurance coverage, or inferior health insurance following the reduction in hours

"Workforce Management"
Marin v. Dave & Buster's Inc.

- Plaintiff's Allegations:
  - D&B engaged in "a nationwide effort…to 'right size' the number of full-time employees, thus permitting [D&B] to avoid the costs associated with the ACA."
    - Alleged purpose was to reduce a large number of FT employees' hours, thus making them ineligible for coverage
  - Management stated in a meeting that compliance with ACA would cost as much as $2M, and that, to avoid that cost, D&B would reduce the number of FT employees at their stores
  - For 7 years, Marin worked 30-45 hours per week, but her hours were cut to 10-25 hours per week post-ACA, and she lost coverage (D&B required at least 28 hours/week to be eligible)

"Workforce Management" Prevailing Under ERISA §510

- Plaintiff must either produce direct evidence that employer had a specific intent to violate ERISA §510 or establish a *prima facie* case by showing:
  - He or she was engaged in activity protected by ERISA §510;
  - He or she suffered an adverse employment action; and
  - A causal connection exists between the protected activity and the adverse action
- The employer must then produce evidence of a legitimate, nondiscriminatory reason for the action undertaken
- If employer does so, employee has ultimate burden to establish that the employer was motivated by the specific intent to avoid providing the benefit

"Workforce Management"
Marin v. Dave & Buster's Inc.

- In *Marin*, the Court decided complaint stated a "plausible and legally sufficient claim for relief," and denied D&B's motion to dismiss
- Is *Marin*'s claim ultimately viable?
  - Structuring businesses to avoid payment of taxes (remember Supreme Court determined "pay or play" penalties are taxes)
    - Common & permissible for employers to implement favorable tax planning strategies
  - An ERISA §510 claim does not succeed if the interference with a participant's attainment of a benefits right is just a consequence of an adverse action taken for legitimate reasons
- Facts will likely be very important (in *Marin* and for other employers)
  - When did restructuring occur?
  - Did anyone lose benefits as part of this restructuring?
  - What was the reason provided by employer (internally and externally)?
  - Was there a legitimate business decision that collaterally affects employee's hours and health coverage or an intentional effort to avoid offering coverage?

Current State of ERISA Preemption

- ERISA §514 supersedes any and all state laws so far as they may now or hereafter relate to any employee benefit plan, but:
  - Nothing in ERISA relieves or exempts any person from any state law regulating insurance, banking, or securities (the “savings clause”)
  - No employee benefit plan shall be deemed an insurer, bank, trust company or investment company (the “deemer clause”)

Current State of ERISA Preemption

- ERISA generally does not preempt:
  - State laws regulating insurance
- ERISA generally does preempt:
  - State laws that make reference to ERISA plans
  - State laws that have an impermissible connection with ERISA plans
    - Example: where a state law purports to govern a "central matter of plan administration" or "interferes with nationally uniform plan administration"

ERISA Preemption: *Gobeille v. Liberty Mutual Insurance Co.*

- Background
  - Numerous states (including TN) have “All Payer Claims Databases” (APCDs)
  - APCDs obtain and compile health care claims data from insurers, government programs, and other payers in order to
    - Provide public reporting of health care costs
    - Inform health care improvement initiatives
    - Identify low cost, high value providers

ERISA Preemption: *Gobeille*

- Issue: Application of Vermont's APCD to a self-funded ERISA plan sponsored by Liberty Mutual Ins. Co. for its employees
  - Liberty Mutual's self-funded ERISA medical plan covers lives in all states
  - In 2011, VT ordered Liberty Mutual's TPA to report all medical and Rx claims it administered to the VT APCD
  - Liberty Mutual challenged the order with respect to information about members in its self-funded ERISA plan

ERISA Preemption: *Gobeille*

- District Court granted summary judgment to VT
  - Even though it "may have some indirect effect on health benefit plans," the VT reporting scheme was not preempted
- Second Circuit reversed
  - "One of ERISA's core functions – reporting – [cannot] be laden with burdens, subject to incompatible, multiple and variable demands, and freighted with risk of fines, breach of duty, and legal expense" as under the VT APCD scheme

ERISA Preemption: *Gobeille*

- Supreme Court Holding: VT APCD requirement is preempted (invalid) to the extent it purports to apply to ERISA plans
  - "Reporting, disclosure, and recordkeeping are central to, and an essential part of, the uniform system of plan administration contemplated by ERISA"
  - VT reporting scheme "intrudes upon a central matter of plan administration and interferes with nationally uniform plan administration"
  - "Differing, or even parallel, regulations from multiple jurisdictions could create wasteful administrative costs and threaten to subject plans to wide-ranging liability"

ERISA Preemption: *Gobeille*

- Impact for APCDs
  - State APCD reporting requirements purporting to apply to self-funded ERISA plans are preempted
  - One example - Colorado response:
    - "As a result of the Court's ruling, Colorado cannot require self-insured ERISA plans to provide claims data to the Colorado APCD."
    - Encourages voluntary compliance: "We urge ERISA plans in Colorado to continue supporting transparency by voluntarily submitting claims data to the Colorado APCD."

Questions?

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