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View From Groom: Litigation Risks Associated With Workforce Realignments in Response to the ACA's Employer Mandate

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The Patient Protection and Affordable Care Act's (the ''ACA's'') ''shared responsibility'' provision—commonly known as the ''employer mandate''—is scheduled to be phased in between plan years beginning January 1, 2015 through 2016, depending on an employer's size. The employer mandate generally requires employers with 50 or more full-time employees to either (1) provide a specified level of health care coverage—known as ''minimum essential coverage''—to full-time employees (and their dependents), or (2) pay an excise tax if such coverage is not offered. [1] In addition to this ''play-or-pay'' requirement, the mandate is accompanied by a host of complex new rules and regulations. Among other things, new rules require employers to carefully track the hours worked by all employees (whether full-time, part-time or seasonal) and to file new returns with the Internal Revenue Service (the ''IRS'') concerning the health care coverage offered by the employer, the identity of employees who elected such coverage, the months in which employees were enrolled in coverage, and the cost of coverage.

Not surprisingly, many employers have looked for ways to minimize the burdens of compliance with these new rules. One strategy that some employers have considered involves ''workforce realignments,'' whereby an employer minimizes the use of full-time employees in favor of employees whose status would not trigger the ACA's employer mandate. For example, some employers have publicly stated that they intend to reduce—or stop—the hiring of full-time employees, so that the employer will stay below the 50 full-time employee thresh-

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[1] Internal Revenue Code section 5000A generally defines ''minimum essential coverage'' to mean coverage under:
- a government-sponsored program, such as Medicare, Medicaid, or Tricare;
- an eligible employer-sponsored plan (which includes a grandfathered health plan offered in a group market) which means, with respect to any employee, a group health plan or group health insurance coverage offered by an employer to an employee which is:
  - a governmental plan, or
  - any other plan or coverage offered in the small or large group market within a state;
- a health plan offered in the individual market within a state;
- a grandfathered health plan; or
- such other health benefits coverage as the Secretary of the Department of Health and Human Services recognizes for purposes of Code section 5000A(f)(1)(E).

Code § § 5000A(f)(1) and (2). Because the statutory definition of minimum essential coverage does not include a self-insured group health plan (*i.e.*, a plan under which the cost of benefits are funded entirely by the employer, rather than an insurance company), the regulation under Code section 5000A modifies the definition of minimum essential coverage to include a self-insured group health plan under which coverage is offered by, or on behalf of, an employer to the employee. 26 CFR § 1.5000A-2.

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old that triggers the employer mandate. Other employers have publicly stated that they intend to reduce the hours of what are currently full-time employees, such that these employees will work only part-time hours once the employer mandate takes effect.

The issue of workforce realignment as a means of avoiding the employer mandate, or at least reducing the burdens of compliance, has received a fair amount of press attention. An important issue that has not been well-covered, however, is the litigation risk that employers may face should they undertake workforce realignments that are designed to prevent employees from obtaining health care coverage from the employer. More specifically, employers considering workforce realignments in response to the ACA should be aware of the potential litigation and liability risks that arise under Section 510 of the Employee Retirement Income Security Act (''ERISA''), as well as the ACA's whistleblower provision, Section 1558.

This article provides a high level overview of the complex rules imposed on employers as a result of the employer mandate, which illustrate why some employers are looking to workforce realignments as a strategy for reducing their compliance burdens. The article then discusses the litigation risks under ERISA Section 510 and ACA Section 1558 that employers should consider as they evaluate potential workforce realignments. Finally, it offers practical tips that employers should consider as they ponder workforce realignments, so that they can reduce the risks of potential liability.

I. The ACA's Employer Mandate

One of the most controversial rules under the ACA is the employer shared responsibility requirement, which is codified at Section 4980H of the Internal Revenue Code (the ''Code''). This provision of the law requires ''large'' employers – *i.e.,* those that employed an average of at least 50 full-time and full-time equivalent employees during the prior calendar year[2] – to pay an excise tax in the event that (1) the employer fails to provide minimum essential coverage to ''substantially all'' full-time employees (and their dependents) that is affordable and provides minimum value, and (2) at least one of these employees receives a federal premium tax credit or cost-sharing subsidy for coverage on either a state Exchange or the Federally-Facilitated Exchange (''FFE''). [3]

A. Potential Penalties for Failure to Comply With the Employer Mandate. There are two penalties to which large employers may be subject under Code Section 4980H:

■ The first penalty is under Code section 4980H(a), which imposes a penalty on large employers that (1) fail to offer minimum essential coverage to ''substantially all'' full-time employees (and their dependents) and (2) at least one such employee receives a tax credit or cost-sharing subsidy for coverage purchased through an Exchange. The annualized penalty, which is treated as an excise tax, is $2,000 for each full-time employee (after subtracting 30 or, for the 2015 plan year only, 80) and is calculated on a monthly basis. [4]

■ So, for example, if an employer with 100 full-time employees does not offer minimum essential coverage in 2016 and even one full-time employee receives a premium tax credit or cost-sharing subsidy through an Exchange, the employer would be subject to a penalty of $140,000 ($2000 x 70 (100 full-time employees – 30) = $140,000)).

■ The second penalty is under Code Section 4980H(b), which imposes a penalty on large employers that offer health care coverage to full-time employees and their dependents, but the coverage is deemed inadequate by federal regulators, meaning that the coverage is either: (1) not affordable (*i.e.*, the cost of self-only coverage is more than 9.5% of the employee's income) or (2) does not provide minimum value (*i.e.*, 60% actuarial value of benefits), *and* (3) a full-time employee receives a tax credit or cost-sharing subsidy for coverage purchased through an Exchange. [5] This annualized penalty is equal to the lesser of a $3,000 annual excise tax penalty for each full-time employee who receives the credit (calculated on a monthly basis) or $2,000 per employee for each full-time employee (after subtracting 30 or, for the 2015 plan year, 80). [6]

■ For example, if an employer with 100 full-time employees offers health coverage to such employees—but the coverage is either not affordable or does not provide minimum value—thus allowing 10 full-time employees to qualify for a federal subsidy for Exchange coverage—the employer would be subject to a penalty of $30,000 ($3,000 x 10 employees who qualified for the federal subsidy). [7]

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[2] 26 CFR § 54.4980H-1(a)(4) (definition of large employer).

[3] Generally, premium tax credits and cost-sharing reductions are available to individuals whose household income is between 133-400 percent of the Federal Poverty Level. Code § 36B(b). That said, if an individual who satisfies this income criteria has been offered minimum essential coverage by his or her employer, he or she will ineligible for federally subsidized coverage on an Exchange. See 26 CFR § 1.36B(2)(a). There is an exception, however: if the employer's offer of coverage is either (1) unaffordable (*i.e.*, the cost of self-only coverage is more than 9.5 percent of income) or (2) does not provide minimum value (*i.e.*,, does not have an actuarial value of at least 60 percent), an employee who declines such coverage may qualify for the federal subsidy if he or she is income eligible. *Id. See also* Code § 36B(c)(2)(C) (''[A]n employee shall not be treated as eligible for minimum essential coverage if such coverage—(I) consists of an eligible employer-sponsored plan . . . and (II) the employee's required contribution ... with respect to the plan exceeds 9.5 percent of the applicable taxpayer's household income. . . [and] an employee shall not be treated as eligible for minimum essential coverage if such coverage consists of an eligible employer-sponsored plan . . . and the plan's share of the total allowed costs of benefits provided under the plan is less than 60 percent of such costs.'').

[4] Code § 4980H(a); 26 CFR § 54.4980H-4; 79 Fed. Reg. 8544 -8575 (Feb. 12, 2014). The monthly penalty is $167 times each full-time employee (minus the first 30 (80 in 2015) employees). Code § 4980H(c)(1).

[5] Code § 4980H(b); 26 CFR § § 54.4980H-5; Notice 2013-45 (July 9, 2013).

[6] Code § 4980H(b); 26 CFR § 54.4980H-5. The monthly penalty is the lesser of: (1) $250 times each full-time employee receiving a premium tax credit; or (2) $167 for each full-time employee (minus the first 30 (80 in 2015) employees). *Id.*

[7] As noted above, penalties under Code § 4980H(a) and (b) are triggered only if a full-time employee of a large employer receives a federal subsidy for coverage offered on a state or federally-facilitated exchange. Although outside the scope of this article, it is important to note that the Supreme Court recently agreed to review whether the ACA allows premium tax

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B. Transition Rules for the Mandate's Effective Date. In early 2014, the IRS and the Department of Treasury issued complex final regulations implementing the 4980H provisions. [8] Among other things, the final regulation generally provides that an employer will be treated as offering coverage to ''substantially all'' of its full-time employees – thus avoiding the 4980H(a) penalty – only if it offers such coverage to at least 95 percent of full-time employees and their dependents (which includes children but *not* spouses). [9] In addition, the regulation confirmed the IRS's previous announcement (in Notice 2013-45) that it would not enforce the mandate in 2014, and instead would adopt a two year transition period during which the mandate would be phased in. Specifically, the regulation confirmed that the mandate would be phased in as follows:

- Employers with fewer than 100 full-time and full-time equivalent employees are exempt from the Code Section 4980H penalties for the 2015 plan year, but will be subject to the full range of its provisions beginning in 2016. [10]

- Employers with 100 or more full-time and full-time equivalent employees will be subject to penalties for the 2015 plan year, but will satisfy the requirement to offer coverage to ''substantially all'' full-time employees (and dependents) by offering coverage to 70 percent of full-time employees – rather than 95 percent of full-time employees – which will be required for every plan year thereafter. [11]

C. Calculating the Number of Full-Time Employees. To determine whether an employer has an average of at least 50 full-time employees and is therefore subject to the employer mandate, an employer must count the actual hours of service of employees in the prior year.[12] ''Employer'' and ''employee'' are defined by the common law standard. [13] Under this standard, an employment relationship generally exists if the entity for which the services are performed has the right to control and direct the individual performing the services not only as to the result to be accomplished, but also as to the details and means by which the result is accomplished. [14]

The specific rules for determining employer size are complex. Under both the statute and the final regulations, a full-time employee is an employee who works on average at least 30 hours of service per week (or 130 hours in a month).[15] But the rules also require that full-time equivalent employees be included in the calculation,[16] thus requiring, among other things, that employers track the hours worked by part-time and seasonal employees to determine if the employer is subject to the employer mandate. There are special rules for counting seasonal workers, for counting hours of service for hours worked outside of the U.S., and with respect to ''new'' employers. Further, all entities in a ''controlled group'' are included for purposes of determining whether the employer has at least 50 full-time employees. [17]

The IRS permits only two methods by which employers may determine full-time status: (1) the ''monthly measurement'' method, or (2) the ''look-back'' measurement method. [18] Under the monthly measurement method, an employer generally counts an employee's hours during a particular month to see if the employee was full-time (had an average of at least 30 hours of service per week) for that month. [19] However, Treasury and the IRS recognize that applying these rules on a monthly basis could cause practical difficulties for employers, particularly with respect to employees with varying hours or employment schedules, and could result in employees moving in and out of employer coverage on a monthly basis. For that reason, the regulations permit employers to use the ''look-back'' measurement as an alternative to a rigid month-to-month calculation of full-time employee status.

The look-back method, which is complex, involves the use of a ''measurement period'' for counting hours of service, a corresponding ''stability period'' during which coverage may have to be provided (depending on full-time employee status during measurement period), and an optional ''administrative period'' that allows time for enrollment or disenrollment.[20] To give a simplified example, if an employee is determined to have worked less than an average of 30 hours per week during a measurement period that runs from January 1, 2015-June 30, 2015, the employer may treat the employee as *other* than full-time – and thus not required to be offered health coverage – for a corresponding stability period that runs July 1-December 31, 2015, even if the employee actually works more than an average of 30 hours per week during the stability period. In contrast, if an employee is determined to have worked full-time hours during the measurement period, the employee must be treated as full-time during the corresponding stability period, even if the employee's actual hours during the stability period are less than full-time.

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credits to be offered on Exchanges that are operated by the federal government. Specifically, the Court will review the Fourth Circuit's decision in *King v. Burwell,* 759 F.3d 358 (4th Cir.2014), which held that premium tax credits are available for coverage obtained through a federally-facilitated exchange, notwithstanding the text of the ACA, which provides that such subsidies shall be available for individuals enrolled ''through an Exchange established by [a] *State*.'' Code Section 36B(c)(2)(A)(i) (emphasis added). If the Supreme Court finds that subsidies are *not* available through Federally Facilitated Exchanges, then it is possible that no penalties could be triggered against an employer in the 36 states that have federally-facilitated exchanges. A decision in the *King* case is not expected until June 2015.

[8] 79 Fed. Reg. 8544 (February 12, 2014).

[9] Code § 4980H; 26 CFR § § 54.4980H-4 and -5; 79 Fed. Reg. 8544, 8575 (February 12, 2014); Notice 2013-45 (July 9, 2013). For the definition of a ''dependent'' as including a child but not a spouse, see 26 CFR § 54.4980H-1(a)(12).

[10] 79 Fed. Reg. at 8574.

[11] 79 Fed. Reg. at 8575.

[12] An ''hour of service'' includes all hours for which the employee is paid or entitled to payment. 26 CFR § 54.4980H-1(a)(24).

[13] 26 CFR § 54.4980H-1(a)(15).

[14] 26 CFR § 31.3401(c)-1(b).

[15] The term ''full-time employee'' is defined by Code section 4980H and 26 CFR § 54.4980H–1(a)(21).

[16] 26 CFR § 54.4980H-1(a)(4) (defining an ''applicable large employer'' as ''an employer that employed an average of at 50 full-time employees (including full-time equivalent employees) on business days during the preceding calendar year'').

[17] 26 CFR § 54.4980H-1(a)(16) (definition of ''employer'').

[18] 26 CFR § § 54.4980H-3(a).

[19] 26 CFR § § 54.4980H-3(c).

[20] 26 CFR § § 54.4980H-3(d).

The employer chooses the length of time for the measurement and stability periods, within specified parameters, and may change such periods from year to year, but cannot change either period once the standard measurement period has begun. [21] And the safe harbor requirements differ based on whether employees are ''new'' or ''ongoing'' employees, and, in the case of new employees, whether the employees are expected to work full-time hours, or are considered ''variable'' or ''seasonal'' employees. [22]

D. Employer Reporting Requirements Under the ACA. Closely related to the employer mandate are new reporting rules imposed by the ACA. Beginning in 2016 (for information on 2015), insurers and the sponsors of self-funded group health plans will be required to report, to the IRS, information about health coverage provided during the prior year to all enrollees, including Taxpayer Identification Numbers of all covered individuals and the specific dates that such individuals had such health coverage. [23] This requirement is imposed by Code Section 6055, which was added by the ACA. Importantly, this reporting requirement under Section 6055 applies to *all* employers that offer group health coverage to any of their employees, regardless of whether the employer is considered ''large'' or ''small'' for purposes of the ACA's employer mandate.

In addition, Code Section 6056 – also added by the ACA – requires that employers with 50 or more full-time equivalent employees report, to the IRS, information about health coverage offered during the prior year to full-time employees, including information about the lowest cost option offered and whether the minimum value requirements were satisfied. The IRS has published final regulations outlining these new reporting requirements.[24] The regulations specify that the information will be reported on new IRS Forms 1094 and 1095, and not on Form W-2, as many had hoped.

II. Employer Responses to the ACA's Employer Mandate

The discussion above provides just a high-level summary of the employer mandate rules, but even this summary makes clear that the ACA imposes very complex tracking and reporting rules on employers. The mandate also exposes employers to potentially significant penalties if they either intentionally or inadvertently fail to offer adequate healthcare coverage to their full-time employees. As a result of the employer mandate, many employers – and especially those with variable hour workforces – are now evaluating their benefit plans and their workforce structures, including their use of full-time and part-time employees and the number of hours their part-time employees should work. Among other things, employers have reported considering some of these options (or a combination thereof):

- Providing coverage to all full-time employees, thus avoiding the risk of penalties being assessed under Code Section 4980H(a). [25] Importantly, however, penalties could still be assessed against an employer under Code Section 4980H(b) if the employer's offer of coverage is either unaffordable (*i.e.*, the cost of self-only coverage exceeds 9.5% of income), or does not provide minimum value.

- Dropping health care coverage previously offered to part-time employees and retirees, since the ACA does not require coverage of part-time employees or retirees. Moreover, the availability of guaranteed issue coverage through an Exchange—with the possibility of a federal subsidy for those who are income eligible—may make Exchange coverage more attractive to part-timers and retirees than employer-sponsored coverage.

- Hiring part-time employees instead of full-time employees, as a means of keeping the workforce below the level that triggers the employer mandate.

- Managing the hours of employees, such that they are not allowed to work more than 29 hours per week, to minimize the number of full-time employees to whom coverage may have to be offered; and

- Reducing the hours of employees who currently work full-time, such that their hours will be capped at less than 30 hours per week. [26]

III. Potential Employer Liability Resulting from Workplace Realignments

The ACA itself is silent as to whether—and how—employers may manage employee hours. Moreover, there is no specific ACA prohibition on managing employee work hours as a means of avoiding the employer mandate or its associated penalties. Employers should be aware, however, that ERISA Section 510 and the ACA's whistleblower provision may pose risks to employers that are looking to workforce realignments as a means of responding to the employer mandate. Indeed, the websites for some prominent plaintiffs' law firms are expressly inviting employees who have had their hours cut or capped to contact such firms for a discussion of potential causes of action under ERISA and the ACA.

A. ERISA Section 510 Claims

ERISA section 510 provides, in relevant part that:

[21] 26 CFR § § 54.4980H-1(a)(25), (45)-(46) and 54.4980H-3(d).

[22] *See generally* 26 CFR § § 54.4980H-3(d)(1)-(3).

[23] Information Reporting of Minimum Essential Coverage, 79 Fed. Reg. 13,220 (Mar. 10, 2014); *see also* Information Reporting of Minimum Essential Coverage; Correction, 79 Fed. Reg. 24,331 (Apr. 30, 2014).

[24] Information Reporting by Applicable Large Employers on Health Insurance Coverage Offered Under Employer-Sponsored Plans, 79 Fed. Reg. 13,231 (Mar. 10, 2014).

[25] As noted above, the premium tax credit and federal cost-sharing subsidies are not available to employees who have been offered minimum essential coverage by their employers that is both affordable and provides minimum value.

[26] Consumer groups have raised concerns that employers may attempt to avoid (or minimize) the impact of the employer mandate by reclassifying employees as independent contractors, thus avoiding an obligation to provide health care coverage to what were previously full-time employees. It should be noted, however, that classification of a worker as an ''independent contractor'' is not dispositive, and the IRS has a lengthy test for determining whether an employment relationship exists. Thus, merely labeling a worker as an independent contractor will not shield an employer from potential employer mandate liability. See generally, 79 Fed. Reg. at 8567 (Preamble discussion of worker classification issues).

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It shall be unlawful for any person to discharge, suspend, expel, discipline or discriminate against a participant or beneficiary. . .for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. . . .

1. Elements of a Section 510 Claim. A Section 510 claim has two basic elements. *First*, the plaintiff must prove an adverse workplace action of the type covered by the statute. *Second*, the plaintiff must prove that the employer took that adverse workplace action ''for the purpose of interfering with the attainment'' of the plaintiff's benefit rights.

With respect to the first element, most Section 510 cases involve employer actions that clearly are covered by the statute – frequently the discharge of an employee that is allegedly undertaken to prevent the employee from vesting in a retirement plan benefit. Note, however, that the Supreme Court has ruled that Section 510 applies with equal force to retirement and health plans and that it protects employees from adverse employment actions related to ERISA–covered benefits, regardless of whether such benefits are vested. *Intermodel Rail Employees Association v. Atchison, Topeka and Santa Fe Ry. Co.,* 520 U.S. 510, 515-16 (1997).

Occasionally, however, courts have been called upon to consider whether Section 510 extends to employment actions that are not expressly enumerated in the statute, such as the reclassification of an employee from a position that is eligible for benefits to one that is not benefit eligible. And a number of courts have broadly construed Section 510's prohibition on actions that ''discriminate'' to include, for example, such a reclassification. [27]

Employees that allege adverse actions that are covered by Section 510 cannot prevail unless they establish that such actions were taken ''for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan.'' [28] This generally requires a plaintiff to establish the employer had the ''specific intent'' to interfere with his or her ERISA plan rights. ''Specific intent'' means that interference with ERISA plan rights was a ''motivating factor'' in the employer's decision, *i.e.*, a factor which had ''a determinative influence on the outcome'' of an employer's decision. [29] In defending section 510 claims where an adverse employment action has been shown, employers will generally seek to establish that the action was motivated by legitimate corporate goals, and that the loss of benefits was simply incidental to the overall corporate decision. Under this standard, no cause of action will lie where the loss of benefits was a ''mere consequence of, but not the motivating factor behind'' an adverse action.[30]

2. Likely Scenarios Involving the ACA and ERISA Section 510 Claims. As applied to the ACA, there is little doubt that plaintiffs' attorneys will seek to use Section 510 as an avenue to sue employers that have reassigned workers from full-time to part-time jobs (or otherwise reduced or capped hours) as a response to the ACA's employer mandate. Indeed, as noted above, some plaintiffs' firms are *advertising* for clients that have had their hours cut or jobs reassigned due to the employer mandate, and it is easy to envision class action lawsuits against employers who have undertaken workplace realignments. These lawsuits would likely allege that an employer's act of limiting or capping hours interfered with an employee's ''attainment'' of a benefit otherwise available under the plan.

The Section 510 claim that likely poses the greatest risk to employers is one alleging that employees who were classified as full-time—or who were working sufficient hours to qualify for health benefits before the mandate took effect—were reclassified to part-time status or had their hours cut such that they no longer qualified for employer health coverage, allowing the employer to escape the employer mandate penalties for not offering minimum essential coverage to this class of employees (and their dependents). In such a case, the risks of a Section 510 claim could be significant, given that some courts have found that reclassification actions (*e.g.*, moving an employee to independent contractor status) can be an adverse workplace action within the meaning of ERISA Section 510. And if the change to part-time status (or reduction in hours) were motivated in material part by a desire to limit eligibility under the employer's plan, the second element of a Section 510 claim could be satisfied. Importantly, however, if the reclassification were part of an overall corporate strategy relating to managing employment costs and creating a more flexible workforce—with health care costs just an ancillary concern—then then the employer may have a strong defense to a Section 510 claim.

With respect to part-time employees who have historically *not* qualified for employer health coverage, the likelihood of success on a Section 510 claim seems to be lower. This is because such employees are currently not eligible for health benefits, and the implementation of an ''hours management system'' that limits employees to no more than 29 hours per week would not adversely impact their benefit eligibility. Put simply, such employees would not be entitled to benefits under the employer's plan either before or after the adoption of the hours management system, making it difficult for the plaintiff to establish that the employer's action was taken to prevent the attainment of benefits. This might be a closer question if, at the time of hiring, an employee had been

[27] *Seaman v. Arvida Realty Sales,* 985 F.2d 543–547 (11th Cir. 1993) (terminating an employee for refusing to be reclassified as a non-benefits eligible independent contractor raises a colorable claim under Section 510); *Benders v. Bellows and Bellows,* 515 F. 3d 757, 765 (7th Circuit 2008) (''Section 510 protects the employment relationship giving rise to [plan] rights. In addition to termination, § 510 also applies to situations where an employer reclassifies an employee as an independent contractor as long as the employer had the specific intent to deprive an employee of his plan rights.'') (Internal citations and quotations omitted); *Glitz v. Compagnie Nationale Air France* 129 F. 3d 554, 559 (11th Cir. 1997) (Summary Judgment not proper under section 510 where trier of fact could conclude that company reclassified employees for purpose of interfering with future plan benefits.) *See also Mattei v. Mattei,* 126 F.3d 794, 803–04 (6th Cir. 1997) (''discriminate'' means to differentiate or interfere, and can include any kind of adverse action, including actions outside of the employment context).

[28] *Curby v. Solutia, Inc.,* 351 F.3d 868, 871 (8th Cir. 2003) (where plan documents clearly do not provide benefits to plaintiff, plaintiff does not have an ERISA claim).

[29] *Barbour v. Dynamics Research Corp.,* 63 F.3d 32, 37 (1st Cir. 1995).

[30] *Id.*

told he or she was expected to work 30 or more hours per week (giving the employee the expectation that he or she would become benefits-eligible), but a later instituted company policy precluded that.

Another area of potential Section 510 risk involves employees who are newly hired by a company *after* a workplace realignment/hours management system has been adopted, and who are told they will work less than 30 hours—and therefore will not be eligible for benefits. Section 510 of ERISA provides that it is only ''participants and beneficiaries,'' who have a cause of action against an employer for an adverse employment action that impacts eligibility for benefits. But prospective or newly-hired part-time employees in this scenario would be neither participants nor beneficiaries under the employer's plan, because such employees would not have any colorable claim to employer-provided health benefits, which much exist to have standing to bring suit under Section 510. Moreover, because these employees would be new hires, there would be no adverse employment action by the employer against them, assuming that the employer clearly communicates their part-time status (and ineligibility for health care coverage) prior to, or at the time of hiring. Given that the decision to hire an individual as a part-time or variable hour employee falls squarely within an employer's hiring discretion, the likelihood of success of a Section 510 claim brought by a newly-hired part-time or variable hour employee seems low. [31]

B. ACA 'Whistleblower' Claims

The ACA has its own nondiscrimination provision that precludes employers from retaliating against employees with respect to certain rights protected by the ACA. Specifically, ACA Section 1558 amends the Fair Labor Standards Act (the ''FLSA'') to prohibit employer retaliation against any employee who:

- Receives a premium tax credit or cost-sharing subsidy through an Exchange;
- Provides information to an employer, the federal government, or state attorney general regarding an ACA violation;
- Testifies about an ACA violation;
- Assists or participates in a proceeding about an ACA violation; or
- Objects to, or refuses to participate in, an activity reasonably believed to be in violation of the ACA. [32]

1. Elements of a Section 1558 Claim. Enforcement of this provision is assigned to the Occupational Safety and Health Administration (''OSHA''). OSHA has issued regulations interpreting Section 1558, [33] and such regulations set forth an expansive list of ''prohibited acts'' that employers may not take against employees – including the termination of employment, reduction of hours, ''disciplining,'' and making ''threats'' to terms and conditions of employment – for actions protected by Section 1558. [34] As relevant here, the plain language of Section 1558 and its implementing regulation make clear that an employer may not terminate, demote, or discipline an employee who receives a premium tax credit or cost-sharing reduction for coverage on the Exchange—which is clearly designed to protect full-time employees whose eligibility for subsidized Exchange coverage may trigger the assessment of a penalty on the employer under Code Section 4980H.

Notably, neither Section 1558 nor its regulation provide that *preemptive* employer actions that are designed to minimize the employer's exposure to penalties under the ACA's employer mandate – such as moving employees to part-time status or capping hours – constitutes a ''prohibited act'' for purposes of ACA Section 1558. This is consistent with the statutory text, which imposes liability only for adverse employment actions against employees who actually ''receive'' a tax credit or subsidy through an Exchange—indicating that employer actions with respect to employee hours that are taken in anticipation that some employees might potentially qualify for federally subsidized coverage should not be prohibited by Section 1558. But informal conversations with federal regulators suggest that OSHA and the Department of Labor are actively considering whether Section 1558 can be interpreted more broadly, to make workplace realignments of the nature discussed in this article subject to Section 1558.

2. Litigating Section 1558 Claims. The OSHA regulations provide that employee claims of impermissible employer retaliation under Section 1558 must be filed with OSHA within 180 days from when the date when the retaliatory decision was both made and communicated to the employee.[35] OSHA then has exclusive jurisdiction to evaluate the complaint, although an employee may file a lawsuit against the employer in U.S. District Court if OSHA does not issue a decision on the employee's complaint within 210 days of its filing. [36]

Under the OSHA procedures, the employee is required to make a prima facie showing that his or her protected activity was a ''contributing factor'' to the employer's adverse employment action, whether alone or in combination with other factors. [37] In other words, the employer need not show that his or her protected activity was the sole reason for the employer's adverse action—only that it was a factor in the employer's decision making process.[38] The employer, ''to escape liability'' must then present evidence to rebut the employee's assertion, by showing that the employer would have taken the same adverse action regardless of the employee's protected activity.[39] Notably, the regulation provides that an employer can escape liability only by providing by *clear and convincing evidence* that it would have taken the adverse employment action without regard to the protected activity, which is higher standard than the employee must satisfy.[40]

OSHA is required to issue written findings as to its adjudication of the case within 60 days of the close of

[31] *Edes v. Verizon Communications, Inc.,* 288 F. Supp. 2d 55, 59 (D. Mass. 2003) (''[A]n employer may hire employees under terms that render them ineligible to receive benefits given to other employees without violating § 510.'').
[32] ACA Section 1558, which adds Section 18C to the FLSA.
[33] 29 CFR Part 1984, 78 Fed. Reg. 13222 (Feb. 27, 2013).
[34] 29 CFR § 1984.102.
[35] 29 CFR § 1984.103.
[36] 29 CFR § 1984.114.
[37] 29 CFR § 1984.104(e)(1).
[38] *Id.*
[39] 29 CFR § 1984.104.
[40] 29 CFR § 1984.104(e)(4).

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the record. [41] If OSHA finds in favor of the employee, it can provide relief to the employee that includes:

- Preliminary reinstatement to job/position;
- Action to abate the violation;
- The award of back pay with interest;
- Recovery of attorney fees; and
- Compensatory damages. [42]

An employer against whom judgment is entered has 30 days to file written objections with OSHA, and such objections will be reviewed by an administrative law judge (''ALJ'').[43] An employer's objection to OSHA's finding will result in a stay of the OSHA findings—and any relief that OSHA ordered—except that there is no automatic stay of an order to reinstate the complainant to employment. [44] An adverse ALJ ruling may be appealed to DOL's Administrative Review Board (''ARB'') within 14 days of the ALJ's decision. The ARB has discretion to hear an employer's appeal.[45] Any final decision of an ALJ or ARB (if applicable) may be appealed to a federal court for the circuit in which the violation allegedly occurred or in which the employee resided on the date of the alleged violation. [46]

If OSHA rules against the employee, the employee has 30 days to file objections to the ruling, and the same ALJ/ARB process described above applies. Alternatively, the employee may file an action against the employer under Section 1558 in the applicable U.S. District Court within 90 days of the issuance of findings by OSHA as to whether or not there is reasonable cause to believe that the employer impermissibly retaliated against the employee.[47] The district court has the same authority to award relief as OSHA, including the authority to award ''injunctive relief and compensatory damages,'' as well as ''compensation for any special damages sustained as a result of the discharge or discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.'' [48]

IV. Steps Employers Should Take to Minimize Liability Risks

A critical element in both ERISA Section 510 and ACA Section 1558 cases is whether the employer acted with intent. In the case of ERISA Section 510, a plaintiff must establish that the employer took adverse employment action with the specific intent to interfere with the plaintiff's attainment of a benefit under the employer's plan. In the case of ACA Section 1558, the plaintiff must establish that a desire to retaliate against the employee for the exercise of a protected right – such as the receipt of a federal subsidy on an Exchange – was a ''contributing factor'' to employer's decision to take adverse employment action.

Because plaintiffs must prove intent, there are steps that employers can take to minimize ERISA Section 510 and ACA Section 1558 exposure, which include the following:

- Most importantly, employers should avoid making public statements concerning their political feelings about the employer mandate or their strategies to address it. Some employers have issued press releases announcing their intent to reduce their workforces or to cut hours in response to ''Obamacare's'' employer mandate. It is likely that such press releases have not only made those employers potential targets of ERISA Section 510 lawsuits (including class actions), but that such press releases will also be introduced as evidence of the employers' specific intent to take adverse employment action that interferes with the attainment of benefits.

- Employers and human resources personnel (as well as benefits consultants) should carefully craft written materials concerning an employer's strategy options with respect to the employer mandate. PowerPoint presentations, memos to Board committees, RFPs, and meeting minutes about possible staffing and benefit changes should avoid reference to cost savings or penalty avoidance projections that would result from terminating employees from employer-provided health coverage, and should instead focus on the employer's staffing needs.

- Employers should involve experienced ERISA counsel in the vetting of benefit strategy options to address employer mandate issues, so that counsel can preemptively identify potential liability risks associated with the options under consideration.

- Employers that are planning on reducing employee hours may want to consider exceptions for existing employees who are currently eligible for health care benefits. Specifically, given that employees who previously worked 30 hours per week or more and who were eligible for health benefits are likely to have the strongest potential Section 510 claims, it may be worth considering exempting such employees from hours reductions.

- Finally, with respect to new employees who are hired for less than full-time positions (*e.g.*, part-time, variable hour, or seasonal employees), employers should clearly communicate to such employees, in writing, that they will not be eligible for benefits under the employer's plan.

[41] 29 CFR § 1984.105.
[42] 29 CFR § 1984.105(a)(1).
[43] 29 CFR § 1984.106(a).
[44] 29 CFR § 1984.106(b).
[45] 29 CFR § 1984.110.
[46] 29 CFR § 1984.112(a).
[47] 29 CFR § 1984.114(a).
[48] 29 CFR § 1984.114(b).