Dinner for Two: Employer Mandate, Meet ERISA; How Dave & Buster's Response to the Affordable Care Act's Employer Mandate May Open the Door for Employees to Seek ERISA Relief

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I. INTRODUCTION

When the Affordable Care Act[1] (ACA) became law in late March, 2010, Dave & Buster's (D&B) had a choice: it could either comply and offer its full-time employees the minimum health insurance coverage required by the new "employer mandate" or it could ignore the new requirements and incur a penalty. Dissatisfied with either option, D&B made the drastic decision to circumvent the ACA entirely, and reduced its full-time staff below the ACA's employee threshold so as to avoid triggering any penalty or having to pay increased health care costs.

However, by dodging the employer mandate, D&B may have come in direct conflict with section 510 of the Employee Retirement Income Security Act of 1974[2] (ERISA). Section 510 prohibits an employer from purposefully interfering with an employee's attainment of benefits. Because D&B reduced its full-time staff below the ACA's employee threshold specifically to avoid paying for employee health insurance, it arguably interfered with its employees' attainment of benefits.[3] While the Supreme Court has repeatedly refused to hear constitutional challenges to the employer mandate,[4] this article suggests that it could reach that point in the near future.

Part II of this article addresses ACA's goals, the mechanics of its employer mandate, and the public's reaction to the new health care

1. The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S.C.) and the Health Care and Education Reconciliation Act, Pub. L. No. 111-152 (2010) (codified as amended in scattered sections of the U.S.C.) [hereafter The Affordable Care Act]. *See, e.g.*, *Strategic Goals*, HHS.GOV (Feb. 9, 2016), http://www.hhs.gov/about/strategic-plan/strategic-goal-1/.

2. Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 and 29 U.S.C.).

3. Complaint at ¶ 24, Marin v. Dave & Buster's, Inc., 159 F. Supp. 3d 460, 463 (S.D.N.Y. 2016) (No. 15CV3608) [hereinafter Compl.].

4. Lyle Denniston, *Challenge to the ACA Employer Mandate Fails*, SCOTUSBLOG (Dec. 2, 2013, 9:42 AM), http://www.scotusblog.com/2013/12/challenge-to-aca-employer-mandate-fails/.

requirements. Specifically, this Part discusses how "large employers" are defined and how penalties are assessed. Part III analyzes D&B's decision to reduce a significant portion of its full-time employees to part-time status in an effort to avoid future increased costs under the new ACA regime. Part IV addresses the history of section 510 and section 510 claims, generally. In turn, Part V addresses the bones of a section 510 Complaint filed by Maria De Lourdes Parra Marin, a D&B employee, as well as D&B's unsuccessful Motion to Dismiss. Part VI discusses the two parties' potential post-discovery arguments and the application of canons of statutory interpretation. Finally, Part VII, addresses both possible outcomes should such arguments reach the summary judgment phase, and the potential consequences of either outcome.

II. EXCHANGING NUMBERS: THE SPECIFICS OF THE ACA'S EMPLOYER MANDATE

A. *The Goals of the ACA*

When President Obama signed the ACA into law in 2010, it was enacted to address three principal goals: (1) to increase the number of Americans covered by health insurance; (2) to decrease the cost of health care; and (3) to improve the quality of care patients receive.[5] Indeed, at the signing, President Obama concluded that the ACA enshrines "the core principle that everybody should have some basic security when it comes to their health care."[6] To accomplish these three goals, Congress laid out ten provisions that addressed a range of health care issues, from improving the quality and efficiency of health care to health care transparency and community living assistance services.[7] Further, the ACA mandated that every state implement a "health insurance exchange,"[8] where individual consumers and

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5. *Health Reform in the 21st Century: Expanding Coverage, Improving Quality and Controlling Costs*: *Hearing before the H. Comm. on Ways and Means*, 111th Cong. 5 (Mar. 11, 2009) (statement of Karen Davis, Ph.D., President, The Commonwealth Fund).

6. Sheryl Gay Stolberg & Robert Pear, *Obama Signs Health Care Overhaul Bill, With a Flourish*, N.Y. TIMES (March 23, 2010), http://www.nytimes.com/2010/03/24/health/policy/24health.html.

7. *Strategic Goals*, *supra* note 1.

8. BERNADETTE FERNANDEZ & ANNIE L. MACH, CONG. RESEARCH SERV., R42663, HEALTH INSURANCE EXCHANGES UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (ACA) 2 (2013). Specifically, each state could choose to establish its own "state exchange" or implement a

corporations could compare and potentially purchase health insurance plans, with a government subsidy in certain cases.[9] Thus, the ACA addressed not only *what* new health care services would be covered and *who* the beneficiaries of this expanded care would be but *how* each state should meet the ACA's new requirements.[10]

To finance the ACA's expansion, Congress embedded finance mechanisms into its provisions, one of which is the employer mandate.[11] Generally speaking, the employer mandate penalizes employers with more than fifty employees if they fail to offer health insurance of a certain quality to their full-time workers.[12] ACA advocates maintain that this "accountability check" encourages employers to provide adequate health care to their employees.[13]

B. *The Employer Shared Responsibility Provision*

The employer mandate officially falls under the ACA's Employer Shared Responsibility provision.[14] Under this section, applicable large employers[15] (ALE) must offer minimal essential health coverage[16] to at least

marketplace run by the Secretary of Health and Human Services, commonly referred to as a "federal-facilitated exchange." *Id.*

9. 42 U.S.C. §§ 18031(b), 18041 (2012).

10. *See 5 tips about the Health Insurance Marketplace*, HEALTHCARE.GOV, https://www.healthcare.gov/quick-guide/one-page-guide-to-the-marketplace/ (last visited Dec. 4, 2016).

11. 26 U.S.C. § 4980H (2012). While the provision's full name is "Shared responsibility for employers regarding health coverage," the "employer mandate" remains its popular name. *See, e.g.*, *Employer Shared Responsibility Provisions: Basic Information*, IRS, https://www.irs.gov/affordable-care-act/employers/employer-shared-responsibility-provisions (last updated Aug. 5, 2016).

12. 26 U.S.C. § 4980G(a).

13. *ObamaCare Employer Mandate*, OBAMACAREFACTS (May 13, 2016), http://obamacarefacts.com/obamacare-employer-mandate/.

14. *See* 26 U.S.C. § 4980H(a).

15. *See* 26 U.S.C. § 4980(c)(2).

16. Minimum essential health benefits must include items and services within at least the following ten categories:

> ambulatory patient services; emergency services; hospitalization; maternity and newborn care; mental health and substance use disorder services, including behavioral health treatment; prescription drugs; rehabilitative and habilitative services and devices; laboratory services; preventive and wellness services and chronic disease management; and pediatric services, including oral and vision care.

Essential Health Benefits, HEALTHCARE.GOV, https://www.healthcare.gov/glossary/essential-health-benefits/.

95% of full-time employees[17] (FTEs) or suffer a tax penalty.[18] However, small businesses, with fewer than fifty FTEs, are not subject to the shared responsibility provision.[19]

1. How to Calculate an "Applicable Large Employer"

Determining whether an employer is large or small may, at first, seem straightforward. However, the ACA counts more than just the number of traditional FTEs into its ALE calculus.[20] It also considers the number of hours worked by full-time equivalent employees[21] (FTEEs), a number determined by dividing the aggregate number of hours worked by non-FTEs per month by 120.[22] Thus, when determining whether an employer is large or small, both an employer's traditional FTEs and its FTEEs are taken into consideration.[23] By including part-time hours in its calculations, the ACA theoretically dis-incentivizes employers from slashing individual employee hours below the thirty-hour margin.[24]

2. How to Calculate a Penalty

If an employer is determined to be an ALE but offers no health coverage and even one of that employer's FTEs receives a premium tax credit or cost

17. Generally speaking, full time employees are those who work an average of thirty hours or more per week. *See* 26 U.S.C. § 4980H(c)(4)(A). Additionally, the ACA requires such health insurance be offered not only to FTEs but their dependents, up to age twenty-six. 26 U.S.C. § 4980H(a)(1); 42 U.S.C. § 300gg-14(a)(2012).

18. *See* 26 U.S.C. § 5000a (2012). If the employer fails to offer minimal essential health coverage to its employees, then the employer must pay an "employer shared responsibility payment" to the Internal Revenue Service. *See Employer Shared Responsibility Provisions*, IRS (March 2, 2016), https://www.irs.gov/Affordable-Care-Act/Employers/Employer-Shared-Responsibility-Provisions; *ObamaCare Employer Mandate*, *supra* note 13. The Supreme Court has already seen significant challenges to the ACA's penalty provisions. *See, e.g.*, Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751 (2014) (holding that, under the Religious Freedom Restoration Act, the government could not deny a closely held for-profit corporation claiming religious beliefs an exemption from tax penalties assessed for violating a contraceptive mandate adopted under ACA).

19. *See* 26 U.S.C. § 4980(c)(2).

20. *See* 26 U.S.C. § 4980(c)(4); *see also PPACA Employer Mandate Information*, NFIB.COM (Nov. 15, 2011), http://www.nfib.com/cribsheets/employer-mandate/.

21. *See* 26 U.S.C. § 4980(c)(2)(E).

22. *Id.*

23. *See PPACA Employer Mandate Information*, *supra* note 20.

24. *Id.*

sharing reduction, then the employer must pay a penalty.[25] Generally speaking, that penalty is equal to $2,000 per year[26] multiplied by the number of the employer's traditional FTEs minus the company's first thirty FTEs.[27] So, for example, if an ALE with fifty-one FTEs offered no health coverage and one of its employees receives an individual tax credit or cost sharing reduction, the company will be assessed a $42,000 penalty, ($2,000 x (51-30) = $42,000).[28] On the other hand, if none of the same business's employees receive an individual premium tax credit or cost-sharing reduction, it would not be penalized—whether or not the company offers health insurance.[29]

Employers will also suffer penalties if they offer health coverage that is "inadequate"[30] or "unaffordable"[31] and, as a result, at least one FTE receives a premium tax credit or cost sharing reduction.[32] In this circumstance, the penalty will be either: (1) $3,000 per employee receiving government assistance;[33] or (2) $2,000 per traditional FTE (again, minus the first thirty employees), whichever is less.[34] Thus, if an ALE with fifty FTEs were to offer "inadequate" or "unaffordable" coverage, and two of its traditional full-time employees ended up receiving a premium tax credit or cost sharing reduction, that business would be assessed a $6,000 penalty, (2 x $3,000 = $6,000), because $6,000 is less than the other option, ($2,000 x (50-30) =

25. *See* 26 U.S.C. § 4980H(b)(1); *see also Shared Responsibility Requirements*, HEALTHCOVERAGEGUIDE.ORG, http://healthcoverageguide.org/affordable-care-act/shared-responsibility-requirements/ (last visited Jan. 25, 2017).

26. *See* 26 U.S.C. § 4980H(c) (requiring the assessment of 1/12 of $2000 "with respect to any month").

27. *See* 26 U.S.C. § 4980H(c)(2)(D)(i).

28. *See* 26 U.S.C. § 4980H; *Shared Responsibility Requirements*, *supra* note 25.

29. *See generally* 26 U.S.C. § 4980H.

30. *PPACA Employer Mandate Information*, *supra* note 20 (noting that a plan is inadequate when it covers less than 60% of health care expenses).

31. *Id.* (noting that a plan is unaffordable when an employee's share of the health care premium costs the employee more than 9.5% of that employee's annual household income). However, because employee eligibility for subsidies is based on employees' total income, which may come from multiple sources, and employers have no access to that information, subsequent regulations altered the test to create a "safe harbor" provision for employers. *PPACA Employer Mandate Information*, *supra* note 20. Now, the employer may rely on the employee's W-2 Form to check if the penalty was correctly triggered. *Id.* Likewise, by definition, an employer who fails to offer any coverage would not be offering affordable, adequate coverage. *Id.*

32. *See generally* 26 U.S.C. § 4980H.

33. 26 U.S.C. § 4980H(b)(1)(B).

34. 26 U.S.C. § 4980H(c)(1).

$40,000)). Alternatively, if the same business employed fourteen FTEs who ended up receiving a health care subsidy, the business would be assessed the $40,000 penalty, (2,000 x (50-30) = $40,000), because it would be less than the alternative, ($3,000 x 14 = $42,000).[35]

3. The Public's Reaction to the Employer Mandate

Not surprisingly, many businesses were disappointed with the ACA's employer mandate because they believed requiring them to provide more expensive health care benefits to their employees dis-incentivized business growth.[36] Dissidents have argued that the employer mandate discourages small businesses from hiring additional employees beyond a certain threshold because only ALEs are penalized for failing to offer the prescribed coverage.[37] They have also suggested that, to avoid the associated increased health insurance costs or penalties, businesses might refrain from expanding into other markets all together, a decision that could hamper economic growth.[38] Additionally, some have proposed that the ACA could stunt new business creation by increasing startup costs.[39]

Another of the employer mandate's potentially problematic features is its exclusive use of an employer's traditional FTEs in calculating penalties.[40] Because FTEEs are not employed in such penalty calculations,[41] companies can theoretically avoid incurring penalties by reducing FTEs to part-time status. Such reductions could result in less hardworking and less enthusiastic employees, which could, in turn, lead to less overall productivity. Moreover, as in the case of Maria De Lourdes Parra Marin, such reductions might well result in devastating personal losses to valued employees.

In contrast, proponents of the employer mandate have argued that, at the

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35. *Id.*

36. Savannah Saunders, *Three Reasons Why Congress Should Repeal the Employer Mandate*, ECONOMICS21.ORG (July 15, 2015), http://www.economics21.org/html/three-reasons-why-congress-should-repeal-employer-mandate-1404.html.

37. *Id.*

38. *Id.*

39. *The Employer Mandate May Deter Business Growth*, EPAYROLLEXPRESS, http://www.epayrollexpress.com/the-employer-mandate-may-deter-business-growth/ (last visited Jan. 26, 2017) ("The regulations included in the mandate will clearly impact a [new] company that needs to hire in excess of 50 employees.").

40. *See* 26 U.S.C. § 4890(c)(2)(D).

41. *See id.*

time the ACA was enacted, roughly 96% of businesses in America were small businesses with less than fifty FTEs.[42] Consequently, the majority of American businesses should be exempted from compliance with the mandate, making the public's negative reaction needlessly overzealous.[43] Moreover, proponents have also argued that the penalties were merely an "accountability" mechanism to keep employers honest.[44] If businesses just follow the employer mandate's protocols, the argument goes, employees should receive much-needed health care and employers should avoid penalties entirely.[45]

Unsurprisingly, despite the fact that the employer mandate addresses each of the ACA's three admirable goals: increasing access, improving quality, and decreasing cost; and despite the fact that it essentially self-funds,[46] it has sparked great debate across the political spectrum.[47] Businesses have not rolled over and accepted the increase in operating expenses with open arms. Rather, employers have begun to think strategically about ways to circumvent the employer mandate entirely.[48]

III. DINNER FOR TWO: DAVE & BUSTERS, MEET ERISA

Employers had three options to respond to the ACA's employer mandate: (1) they could comply with the ACA by increasing and expanding their healthcare coverage; (2) they could ignore the ACA entirely and pay the resulting penalties; or (3) they could reduce their full-time staff below the fifty person threshold in an attempt to avoid triggering any penalty.[49] Perhaps predictably, a common response was to employ "workforce management" techniques to reduce employee hours below the thirty-hour

42. *The Affordable Care Act Increases Choice and Saving Money for Small Business*, WHITEHOUSE.GOV, https://www.whitehouse.gov/files/documents/health_reform_for_small_businesses.pdf (last visited Nov. 8, 2016).

43. *Id.*

44. Linda Ringquist, *The Affordable Care Act: The Good, the Bad, and the Ugly*, HEALTHWORKSCOLLECTIVE, (Apr. 11, 2013), http://www.healthworkscollective.com/lindaringquist/94251/aca-good-bad-and-ugly.

45. *See id.*

46. *See id.*

47. George Vincent, *Breaking Down the Affordable Care Act*, NAT'L L. REV. (June 11, 2010), http://www.natlawreview.com/article/breaking-down-affordable-care-act.

48. *See id.*

49. *See* Leslie Muller et al., *Employer Reactions to the Affordable Care Act*, 31 BENEFITS Q. 51, 51–63, http://www.ifebp.org/inforequest/ifebp/0166491.pdf.

full-time threshold.[50]

Indeed, this was the very course of action that D&B took in 2013 when the company designed and implemented a nationwide effort, allegedly "intended to 'right-size' the number of full-time and part-time employees."[51] At the time, the D&B Health Plan did not satisfy the ACA's new "essential health care benefits" requirements.[52] It was faced with a choice between expanding its health insurance plan to satisfy the employer mandate, which would inevitably cost more; incurring substantial penalties for non-compliance; or figuring out a way to avoid implicating the ACA entirely.[53]

In June 2013, D&B allegedly notified its employees about its decision to cut back hours.[54] Specifically, D&B scheduled two meetings at its Times Square store, in New York City.[55] According to some accounts, at those meetings, managers informed employees that compliance with the ACA could cost D&B as much as $2,000,000 and that D&B planned to reduce its full-time workforce to approximately forty people to avoid incurring that cost or potential penalties for non-compliance.[56] As a result of this considerable hourly reduction, many D&B employees were dropped from their then current D&B Health Benefit Plan because they no longer met the plan's full-time requirement.[57]

In response to the curtailment of her hours, former D&B employee Ms.

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50. *See* Adam Solander & Elizabeth Bradley, *Trying to Avoid ACA Mandate? ERISA 510 May Catch You*, LAW360 (Aug. 22, 2013), http://www.law360.com/articles/464969/trying-to-avoid-aca-mandate-erisa-510-may-catch-you.

51. Compl., *supra* note 3, at ¶ 24.

52. *See* Dave & Buster's Entm't, Registration Statement (Form S-1) (Sept. 8, 2014), https://www.sec.gov/Archives/edgar/data/1525769/000119312514335587/d735753ds1.htm [hereinafter Form S-1].

53. *See id.*

54. *See* Compl., *supra* note 3, at ¶ 26.

55. Jennifer S. Kiesewetter, *Will Dave & Buster's ACA Employer-Mandate Plan Design Land It In Hot Water with ERISA?*, CORP. COUNS., May 2016, at 5, 5 https://static1.squarespace.com/static/5611ade6e4b0ae4a96bf2173/t/5754dd91b6aa6012c7934b39/1465179538104/Corporate+Counselor+May+2016+vol.+31+no.+2.pdf.

56. *See* Marin v. Dave & Buster's, Inc., 159 F. Supp. 3d 460, 461 (S.D.N.Y. 2016). D&B likewise publicized its concern about the ACA's negative impact on its business when it filed a Form S-1 with the Securities and Exchange Commission on September 29, 2014. *See* Form S-1, *supra* note 52. D&B announced that, "[p]roviding health insurance benefits to employees that are more extensive than the health insurance benefits we currently provide and to a potentially larger portion of our employees . . . will increase our expenses . . . and could have a *significant, negative impact* on our business." *See id.* (emphasis added).

57. The full-time requirement at the time was allegedly an "average of at least twenty-eight hours per week." Compl., *supra* note 3, at ¶ 34.

Marin, on behalf of herself and 10,000 other workers similarly situated, filed a class-action lawsuit, alleging that D&B cut her weekly hours from more than thirty to about seventeen, all to avoid providing her with health care coverage in violation of section 510 of ERISA.[58] Specifically, she alleged that D&B's reduction prevented her from maintaining full-time status and therefore destroyed her eligibility for her current medical and vision benefits. Of course, it also resulted in a reduction in her weekly pay from between $450 and $600 to between $150 and $375.[59]

IV. WHAT'S ON THE MENU: HOW TO SINK YOUR TEETH INTO A SUCCESSFUL ERISA CLAIM

ERISA was originally enacted to regulate American employees' pension plans in response to the public's concern that pension plans were being mismanaged under conflicting state directives.[60] Indeed, in *Ingersoll-Rand Co. v. McClendon*,[61] the Supreme Court of the United States stated that Congress intended "to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government." In 1959, however, the Welfare and Pension Plans Disclosure Act (WPPDA) extended ERISA's umbrella[62] to include the regulation of employee benefit plans.[63]

One of the main issues in the case against D&B involves relief under section 510 of ERISA.[64] Section 510 of ERISA 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

58. *Id.* at ¶ 44–52.

59. *Id.* at ¶ 33.

60. *History of EBSA and ERISA*, U.S. DEP'T OF LAB., http://www.dol.gov/ebsa/aboutebsa/history.html (last visited Jan. 26, 2017).

61. 498 U.S. 133, 142 (1990).

62. Specifically, this extension required plan sponsors to provide participants with plan information such as reporting and disclosure requirements, funding standards, fiduciary responsibilities for plan managers and an appeals process for participants to sue for benefits and breaches of fiduciary duties. *See* 29 U.S.C. §§ 301–308, 1021–1031, 1131–1145 (2012).

63. *History of EBSA and ERISA*, *supra* note 60.

64. *See* Marin v. Dave & Buster's, Inc., 159 F. Supp. 3d 460, 461 (S.D.N.Y. 2016).

> 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.[65]

It was principally enacted to prevent "unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights."[66] Indeed, section 510 can be construed to consist of two components: an anti-retaliatory and an anti-interference provision.[67] Cases based on a retaliatory argument typically arise when an employee is terminated for exercising a present right under an existing plan.[68] In contrast, interference actions, under section 510, are prospective in nature.[69] They typically arise in two general circumstances: (1) cases where employees are terminated immediately before becoming eligible for benefits under an existing vested or non-vested plan; and (2) cases where the employer makes a fundamental business decision which, as an indirect consequence, interferes with an employee's attainment of a right to receive benefits under a plan.[70]

"Because the existence of a specific intent to interfere with an employee's benefit rights is critical in section 510 cases—yet is seldom the subject of direct proof"[71] courts generally allocate the burdens of production and order of proof in a manner similar to the approach applied in Title VII and ADEA cases,[72] as laid out in *McDonnell Douglas Corp. v. Green*.[73]

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65. 29 U.S.C. § 1140 (2012). ERISA defines a "participant" as "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan." 29 U.S.C. § 1002(7). Further, an employer's "adverse action" need not only be an employee's "discharge" but can also be a reduction in hours. *See* West v. Butler, 621 F.2d 240, 245 (6th Cir. 1980) (quoting remarks of Senator Hartke) ("Discipline and discrimination can be so unpleasant as to amount to constructive discharge . . . That can be the type of harassment which does not say that one is fired, but makes living such a hell that a person wishes he did not have to hang on and endure.").

66. *West*, 621 F.2d at 245.

67. JOHN J. ROSS ET AL., 25TH ANNUAL INSTITUTE ON EMPLOYMENT LAW, 641, 669 (1996).

68. *See* Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 143 (1990).

69. Frank Spanitz, *Inter-Modal Rail: Will ERISA's Newly Defined Welfare Benefit Noninterference Clause Curb Outsourcing?*, 23 DEL. J. CORP. L. 589 (1998).

70. *Id.*

71. Dister v. Cont'l Grp., Inc., 859 F.2d 1108, 1111 (2d Cir. 1988).

72. *See, e.g.*, *id.*

73. 411 U.S. 792, 802–05 (1973). For reference, in an ADEA or Title VII case, plaintiffs must prove (1) that they are members of a protected class; (2) that they were qualified for the positions they held; and (3) that the timing of the discharge and resulting savings to the employer raised an inference of discrimination. *Id.*

This allocation involves the following burden-shifting scheme:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, non-discriminatory reason for the employee's rejection . . . . Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.[74]

In the prima facie stage, the requirements are *de minimis*.[75] A plaintiff must merely establish facts that support the inference of a prohibited motive.[76] Analogizing to *McDonnell Douglas Corp.*, proof of facts that establish that the timing of an adverse employment action that interfered with employee benefits resulted in significant savings to the employer should suffice to meet the plaintiff's initial burden.[77]

However, once an employer has rebutted a plaintiff's prima facie case by providing an alternate legitimate motive, courts have been very hesitant to find for plaintiffs without particularized facts that speak to an employer's specific intent.[78] In fact, courts have held that "[n]o ERISA cause of action lies where the loss of . . . benefits was a mere *consequence of*, but not a *motivating factor* behind, a termination of employment."[79] Likewise, courts have also held that no employee is entitled to a job, let alone vested options.[80] Rather the employee must prove his or her termination was due to an unlawful purpose.[81]

For example, in *Humphreys v. Bellaire Corp.*,[82] a mining company

74. *Dister*, 859 F.2d at 1111 (citing *McDonnell Douglas Corp.*, 411 U.S. at 793–94) (internal quotation marks omitted).

75. *See id.*

76. *See generally id.*

77. *Cf. McDonnell Douglas Corp.*, 411 U.S. at 802–05.

78. *See, e.g.*, Gavalik v. Cont'l Can Co., 812 F.2d 834, 851 (3d Cir. 1987) (holding that "proof of incidental loss of benefits as a result of a termination will not constitute a violation of § 510"); Titsch v. Reliance Grp., Inc., 548 F. Supp. 983, 985 (S.D.N.Y. 1982).

79. *Titsch*, 548 F. Supp. at 985 (emphasis added).

80. *See Dister*, 859 F.2d at 1111.

81. *See id.*

82. 966 F.2d 1037, 1044 (6th Cir. 1992).

successfully rebutted a miner's prima facie case for a section 510 ERISA claim when it presented a legitimate reason for discharging the miner rather than purposefully interfering with the attainment of his benefits. There, the mining company explained that the miner was fired because he was not considered a "company man" and only company men were reassigned when the mine the plaintiff managed was sold.[83] Consequently, the burden shifted to the miner to prove, by a preponderance of the evidence, that the reasons proffered by the mining company were a pretext for discrimination.[84] The Sixth Circuit held that the miner failed to show the "something more" necessary to create a causal link between his pension benefits and the adverse employment decision.[85]

Generally speaking, section 510 claims are incredibly hard to prove.[86] Without particularized facts that speak to an employer's discriminatory intent, most plaintiffs will be left without recourse.[87] A plaintiff who raises a section 510 ERISA claim, therefore, must typically scale two mountains: (1) successfully establish a prima facie case with particularized facts that illustrate his employer's discriminatory intent, and (2) rebut an employer's legitimate reasons for termination "directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[88]

The lone exceptions are those rare cases involving direct evidence of prohibited intent. For example, in *Seaman v. Arvida Realty Sales*,[89] a real estate agent sued her former employer, alleging that she was terminated

83. *Id.*

84. *Id.*

85. *Id.*

86. Kathlynn L. Butler, *Securing Employee Health Benefits Through ERISA and the ADA*, 42 EMORY L. J. 1197, 1223–34 (1993) (citing Conkwright v. Westinghouse Elec. Corp., 933 F.2d 231, 238 (4th Cir. 1991)) (stating that "specific intent may be very hard to prove as 'employers rarely, if ever, memorialize their specific intent to act unlawfully.' Therefore, plaintiffs generally use circumstantial evidence to prove their case.").

87. *Compare* Gavalik v. Cont'l Can Co., 812 F.2d 834, 865 (3d Cir. 1987) (holding that because the company developed a "liability avoidance program," which authorized plant managers to shift business to plants that had low, unfunded pension liabilities from ones that had more employees with funded pension plans, the employees successfully pled a section 510 ERISA violation), *with* Hendricks v. Edgewater Steel Co., 898 F.2d 385, 390 (3d Cir. 1990) (holding that union member failed to show that terminating his employment eleven months short of pension vesting was done with specific intent to interfere with attainment of pension eligibility).

88. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981).

89. 985 F.2d 543, 544 (11th Cir. 1993).

because she refused to accept a change in status from employee to independent contractor, which resulted in a simultaneous loss of her non-vested health insurance coverage. Because the agent's employer expressly acknowledged that the agent was terminated to eliminate costs associated with the agent's health benefits, the Eleventh Circuit reversed the district court's dismissal of the agent's section 510 claim, holding that "§ 510 prohibits the employer from discharging an employee *for the purpose of* preventing the employee from receiving additional vested benefits."[90] However, even there, the Eleventh Circuit limited its holding, stating that while ERISA prohibits employers from discharging employees to avoid paying vested benefits, it does permit employers to reduce or terminate non-vested rights simply by changing the terms of the plan.[91]

V. MS. MARIN AND DAVE & BUSTER'S SET THE TABLE FOR AN ERISA FIGHT

A. *Complaint & Motion to Dismiss*

In her section 510 Complaint, Ms. Marin alleges that (1) she was a participant in D&B's Plan, which qualifies as an ERISA health insurance plan,[92] (2) she was qualified for her position,[93] and (3) her hours were reduced under circumstances that gave rise to an inference that the reduction was done with the discriminatory intent to cut her health benefits.[94]

D&B moved to dismiss her Complaint, arguing that employees are not entitled to hours and, thus, have no legally sufficient claim to benefits not yet accrued.[95] Indeed, in its Memorandum in Support of its Motion to Dismiss (Def. Memo), D&B asserts that, Ms. Marin's section 510 ERISA claim cannot succeed because ERISA only provides relief for an employer's interference with an employee's attainment of *current* benefits and the ACA was not yet in effect at the time class members' hours were reduced.[96] It

90. *Id.* at 547 (emphasis added).

91. *Id.*

92. Compl., *supra* note 3, at ¶ 7, 20, 45.

93. Compl., *supra* note 3, at ¶ 18, 19, 46.

94. Compl., *supra* note 3, at ¶ 10, 47.

95. Memorandum of Law in Support of Defendant's Motion to Dismiss at 13, Marin v. Dave & Buster's, Inc., 159 F. Supp. 3d 460 (S.D.N.Y. 2016) (No. 15CV3608) [hereinafter Def. Memo].

96. *Id.* at 15 (citing Young v. Pa. Rural Elec. Ass'n, 80 F. App'x 785, 790 (3d Cir. 2003)).

further contends that ERISA does not mandate that employers provide any benefits and that the ACA did not insert any right to coverage into ERISA.[97] Accordingly, D&B maintains that Ms. Marin's Complaint is filled with "legal conclusions" rather than "well-pleaded factual allegations" and, as such, should not survive D&B's Motion.[98]

In support of its Motion, D&B also asserts that the only intent gleanable from the Complaint is an intent to save on its anticipated costs of ACA compliance.[99] It contends that the Complaint is silent in regards to discriminatory intent towards Ms. Marin's benefits circa 2013, when she was dropped to part-time status. Because plaintiffs must allege that their employers specifically intended to interfere with current benefits, and here, Ms. Marin failed to do just that, D&B claims that she did not satisfy the requirements of a section 510 ERISA claim.[100]

D&B also argues that "as applied to sale or closure of an entire unit, [plaintiff] can satisfy section 510 only by showing that *some ERISA-related characteristic special to the unit* . . . [was] essential . . . for closure or sale."[101] Specifically, D&B contends that in cases where one or more employees are targeted for adverse action, plaintiffs must establish that the adverse action was particular to them and, simultaneously, separate and distinct from employees that were not targeted.[102]

As an example, D&B cites to *Andes v. Ford Motor*, where the D.C. Circuit affirmed a summary judgment for Ford Motors on a section 510 claim arising from the sale of a subsidiary company that provided Ford dealers with computer services.[103] There, the court ruled that basic "organizational decisions" are not motivated by employee benefit considerations.[104] Without particularized facts illustrating Ford Motor's discriminatory intent to close one subsidiary over another, the court declined to find an ERISA section 510 violation.[105]

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97. *Id.* at 3, 12 (citing Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 91 (1983)).
98. *Id.* at 17 (citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)).
99. *Id.* at 2.
100. *See generally id.*
101. *Id.* at 20 (emphasis added) (citing Andes v. Ford Motor Co., 70 F.3d 1332, 1338 (D.C. Cir. 1995)) .
102. *Id.*
103. *Andes*, 70 F.3d at 1336–37.
104. *Id.* at 1337.
105. *See id*. In contrast, the Northern District of Oklahoma correctly held that a military aircraft company was in violation of section 510 when it strategically closed a Tulsa, Oklahoma plant

Analogizing to *Andes*, D&B contends that Ms. Marin has not made an allegation that she "or any putative class member was selected for reduction in hours based on anything in her or their benefit situations at the time of the challenged action that differed from the situations of employees whose hours were not reduced."[106] Rather, D&B claims that the Complaint only adequately pleads that D&B's action was adverse to *future* healthcare benefits—benefits not protected by ERISA.[107] Without any supporting evidence that D&B's workforce restructuring was a pretext for targeting employees with a particular ERISA protected characteristics, D&B concludes that the Complaint should be dismissed.[108]

However, in her Memorandum in Opposition to D&B's Motion to Dismiss (Pl.'s Memo), Ms. Marin insists that if D&B's "benefits-related characteristic" argument is to be accepted by the court, it would "render meaningless the purpose, intent, application and enforcement of section 510 of ERISA."[109] Indeed, she argues that such reasoning would allow any employer to interfere with the current benefits of a significant number of employees by reducing their work hours, as long as at least some other similarly situated employees were not subject to the same action.[110]

Ms. Marin contends that D&B cannot avoid liability just because it refrained from reducing other employees, with the same "benefits-related characteristic" as Ms. Marin, from full-time to part-time status.[111] A plaintiff "states a claim under section 510 if he alleges that [a] defendant interfered with his employment relationship with the intent of preventing him from obtaining his . . . benefits (or otherwise interfering with his rights

because, compared to others, it had the most senior workforce and because the company stood to save $24.7 million if that specific plant closed. *See* Millsap v. McDonnell Douglas Corp., 162 F. Supp. 2d 1262, 1267–73 (N.D. Okla. 2001).

106. Def. Memo, *supra* note 95, at 21.

107. *Id.*

108. *Id.* at 22.

109. Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss at 2, Marin v. Dave & Buster's, Inc., 159 F. Supp. 3d 460 (S.D.N.Y. 2016) (No. 15CV3608).

110. *Id.* at 22. For example, in comparison to Title VII discrimination cases, which are subject to the same analysis as section 510 ERISA claims, an employee who can prove that he was terminated because he is black does not also need to prove that other similarly situated black employees were also terminated in order to state a discrimination claim. His case can stand alone. Nor can the employer be shielded from an ERISA violation for its adverse action just because the employer kept other black employees on staff. *Id.* at 22–23.

111. *Id.*

under ERISA.)"[112]

B. Court's Ruling on the Motion to Dismiss

Ultimately, Judge Alvin Hellerstein, of the New York Southern District Court, rejected D&B's Motion to Dismiss and held that Ms. Marin's Complaint stated a plausible and legally sufficient claim for relief, including lost wages and salary incidental to the reinstatement of benefits.[113] Indeed, he stated that the critical element in a section 510 claim is the intent of the employer, and found that Ms. Marin presented a plethora of public announcements that allow for an inference that D&B was purposefully interfering with the attainment of her current benefits.[114] It should be noted, however, that the standard for surviving a Motion to Dismiss is lower than the standards applied post discovery.[115] Consequently, both Ms. Marin and D&B have plenty of time to not only perfect their current arguments but also to come up with new ones.

VI. POST-DISCOVERY STAGE

A. D&B's Unanswered Arguments

In the Order Denying Defendant's Motion to Dismiss, the court concluded that "Defendants' citations to summary judgment opinions [were] not relevant in this early stage of the case."[116] The citations in question referenced *Dister v. Continental Group, Inc.*,[117] and *Kelly v. Chase Manhattan Bank*,[118] cases from the Second Circuit Court of Appeals and the Southern District of New York, respectively.[119] Both cases, however, are "fair game" in the post-discovery stage of this litigation and highlight two arguments that D&B will likely attempt to refine in the future, namely: (1) that D&B's alleged discriminatory intent is not protected by section 510 of

112. *See* Cioinigel v. Deutsche Bank Americas Holding Corp., No. 12 Civ. 434 KBF, WL 120618 at *2 (S.D.N.Y. Jan. 10, 2013).
113. *Dave & Buster's*, 159 F. Supp. 3d at 462–63 .
114. *See* Form S-1, *supra* note 52.
115. *Dave & Buster's*, 159 F. Supp. 3d at 462–63.
116. *Id.* at 463.
117. 859 F.2d 1108 (2d Cir. 1988).
118. 111 F. Supp. 227 (S.D.N.Y. 1989).
119. *See* Def.'s Memo, *supra* note 95, at 6.

ERISA and (2) that ERISA does not cover future, yet to be created benefits.

1. *Dister v. Continental Group, Inc.*

In *Dister*, a former manager argued that his employer, The Continental Group (Continental), terminated his employment four months and seven days before he qualified for enhanced pension benefits, therefore, violating section 510 of ERISA.[120] However, applying the *McDonnell-Douglas* burden-shifting framework, Continental was permitted to provide non-discriminatory reasons for Mr. Dister's termination.[121] The Second Circuit ultimately found that Mr. Dister's termination was the result of "corporate reorganization and a concomitant change in business priorities . . . [in] revising . . . goals and cutting overhead," rather than discriminatory purposes.[122] Consequently, it denied Mr. Dister's section 510 claim.[123]

D&B, in an effort to align themselves with Continental, may try to affirm that section 510 ERISA relief is not appropriate when the alleged "adverse action" is really an organizational decision.[124] However, D&B will have to deal with what appears to be extensive evidence that its motivation to reduce Ms. Marin's hours was to avoid the increased costs of the employer mandate.[125] Not only were two meetings allegedly held at D&B's Times Square location, but the company's public SEC filing also potentially illustrates D&B's discriminatory intent.[126] Thus, Ms. Marin's case can potentially be distinguished from *Dister* because, in contrast to facts alleged in this case, there was no direct evidence of Mr. Dister's employer's intent to avoid accrual of his enhanced pension benefits.

2. *Kelly v. Chase Manhattan Bank*

Likewise, in *Kelly v. Chase Manhattan Bank*, James Kelly, a human resources manager, alleged that his employer, Chase Manhattan Bank (Chase), terminated his employment to prevent him from "participating in

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120. *Dister*, 859 F.2d at 1109.
121. *Id.* at 1113.
122. *Id.* at 1115.
123. *Id.* at 1117–18.
124. *Cf. id.* at 1115.
125. *See Dave & Buster's*, 159 F. Supp. 3d at 461–62.
126. *Id.* at 462.

Chase's voluntary early retirement program."[127] However, the early retirement program that Mr. Kelly rested his section 510 discrimination claim on was not instituted at Chase until eight months after Mr. Kelly was terminated.[128] In that case, the court held that Mr. Kelly failed to make out a prima facie case on the grounds that he was prevented from enjoying a benefit *yet to be created*.[129] Accordingly, it granted Chase's motion for summary judgment on this leg of Mr. Kelly's section 510 claim.[130]

Mr. Kelly also submitted a second section 510 claim. In it he argued that Chase terminated his employment to avoid continuing to employ a high-salaried employee.[131] In essence, Mr. Kelly attested that had he remained a Chase employee, he would have accrued additional benefits.[132] However, the court held that such a claim is not cognizable under section 510 as the plaintiff "must show more than lost opportunity to accrue additional benefits."[133]

Paralleling Chase's winning argument, that Mr. Kelly was not entitled to early retirement program benefits created eight months after his termination, D&B may try to convince the court that the essential health benefits the ACA requires employers to provide employees were not available to Ms. Marin at the time her hours were reduced. However, unlike Mr. Kelly, who was arguing for benefits not yet in existence at the time of his dismissal, D&B's action interfered with Ms. Marin's existing health benefits under her existing D&B Health Plan.[134] Of course, D&B may respond that its reduction was motivated by an intent to interfere with her potential future benefits and not her current benefits and that the former is allowable. Even so, Ms. Marin's case is still potentially distinguishable from *Kelly*.

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127. Kelly v. Chase Manhattan Bank, 717 F. Supp. 227, 231 (S.D.N.Y. 1989).
128. *Id.* at 232.
129. *Id.*
130. *Id.*
131. *Id.* at 231.
132. *Id.*
133. *Id.* at 232 (citing Dister v. Cont'l Grp., Inc., 859 F.2d 1108, 1111 (2d Cir. 1988)).
134. *See* Marin v. Dave & Buster's, Inc., 159 F. Supp. 3d 460, 461 (S.D.N.Y. 2016).

B. Additional Arguments

1. New Benefits Plan

In response to the potential D&B argument that avoiding future, yet to be created benefits is a permissible intent, Ms. Marin may argue that, as applied to an employer that is already offering some health coverage, the ACA merely redefines the "minimum essential heath care benefits"[135] required of pre-existing employee benefits plans. Under this interpretation, the ACA's employer mandate encourages the alteration of on-going benefits plans, not their replacement. If the ACA only encourages revision, it might be argued that the employer mandate, upon its passage, created vested current rights akin to those created when future health plan changes are guaranteed by contract.[136] In which case, D&B's hours reduction would in yet another way directly interfere with vested rights in a current benefits plan.[137] However, D&B could well respond that it had no obligation to follow the mandate and could have just taken the penalty.[138] Because the ACA provides employers, including D&B, the choice to "pay or play," Ms. Marin may have no basis to argue that she had a vested right to new benefits. That said, she could meaningfully counter that, because D&B's SEC Form S-1 filing so clearly stated a concern for negative financial implications, any claim that it would have accepted such a severe penalty over a presumably

135. *See generally* 26 U.S.C. § 4980H (2012).

136. In the alternative, if the court concludes that the employer mandate contemplates wiping D&B's current plan off the table, so to speak, and encourages the establishment of a new replacement benefits plan, one not yet in existence at the time Ms. Marin's hours were reduced, her ERISA claim may well fall short. *See, e.g.*, *Kelly*, 717 F. Supp. at 232 (holding that interference with rights yet to be created does not violate ERISA).

137. *See generally* Seaman v. Arvida Realty Sales, 985 F.2d 543, 545–46 (11th Cir. 1993) ("We agree with the reasoning of the Fourth Circuit . . . which held that Congress did not intend to leave employees unprotected once their rights were vested and that § 510 prohibits the employer from discharging an employee for the purpose of preventing the employee from receiving additional vested benefits. The Fourth Circuit's conclusion is consistent with § 510's language, which protects "the attainment of any right to which such participant may become entitled." One may not conclude that as a matter of law employers will not fire employees to prevent the employees from obtaining future benefits; rather, whether an employer intends to interfere with the employee's right to future benefits is a factual inquiry to be answered on a case-by-case basis. The validity of a § 510 claim does not hinge upon whether the benefits involved are vested but upon the purpose of the discharge. A plaintiff must show that the employer had the specific intent to interfere with the employee's right to benefits.").

138. *See* 26 U.S.C. § 4980G(a).

less costly health plan upgrade amounts to no more than sophistry.[139]

2. Current or Future Health Care Benefits

D&B has yet to really develop what could be one of its strongest arguments: that its decision to cut hours was made *not* to interfere with employees' *current or future* health care benefits but rather to manage business costs through *lawful means*. Because the employer mandate was touted as a tax,[140] and business organizational decisions can include tax avoidance, D&B's could try to frame its choice to move full-time employees to part-time status as a tax management decision. If D&B can explain its reduction hours as motivated primarily by an otherwise lawful tax strategy and not by an intention to interfere with employee benefits, section 510 of ERISA may not be triggered.[141] Indeed, D&B may have hinted to such an argument when it stated that "the ACA [did] not impose an affirmative obligation upon employers to provide health insurance to employees; the law merely imposes a tax if the employer fails to do so."[142]

With this slight pivot, D&B could completely bypass the discussion of an "ERISA-protected characteristic."[143] Consistent with the *McDonnell-Douglas* burden shifting analysis, it could rebut Ms. Marin's claim by explaining its decision as motivated by legitimate, non-discriminatory business motives well within the business judgment presumption: the ubiquitous desire to avoid paying high taxes. Consequently, the burden could shift to Ms. Marin to prove by a preponderance of the evidence, that this reason was merely pretext[144]—a difficult task if the court accepts the

139. *See* Gray v. Wyuka Cemetery, No. 4:08CV3107, 2008 WL 2705599, at *3 (D. Neb. July 10, 2008) (citing Libel v. Adventure Lands of Am., Inc., 482 F.3d 1028, 1034 (8th Cir. 2007) for the proposition that a plaintiff claiming interference with prospective insurance benefits under § 510 need only demonstrate "a causal connection between *the likelihood* of future benefits and an adverse employment action.") (emphasis added).

140. Indeed, the Supreme Court in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2597–98 (2012), held that although the individual mandate was touted as a "penalty," it was a lawful exercise of Congress's taxing power under Article I, Section VIII of the Constitution. *See also* 26 U.S.C. §5000A(b)(1).

141. *See* Titsch v. Reliance Grp., Inc., 548 F. Supp. 983, 985 (S.D.N.Y. 1982).

142. Def.'s Memo, *supra* note 95, at 12.

143. *Id.* at 22.

144. *See, e.g.*, Humphreys v. Bellaire Corp., 966 F.2d 1037, 1044 (6th Cir. 1992) (walking through the burden-shifting analysis in a case where the initial two burdens are held to have been met and the outcome depends on the plaintiff's ability to argue that the defense's proffered legitimate business purpose was pretext).

employer mandate's penalties as simple taxes.[145]

Of course, Ms. Marin is free to counter that the "taxes" D&B intends to avoid are more properly considered healthcare costs and that actions motivated by the desire to interfere with and avoid ERISA-protected healthcare costs have been held to violate of section 510 before.[146] This argument may again be bolstered by D&B's own statements, in its SEC Form S-1, that "[p]roviding health insurance benefits to employees that are more extensive than the health insurance benefits we currently provide and to a potentially larger portion of our employees . . . will increase our expenses . . . [and] could have a *significant, negative impact* on our business."[147] Significantly, nowhere on the SEC Form S-1 does D&B mention avoiding taxes.[148]

C. The Court's Best Option: Canons of Statutory Interpretation?

Looking forward to the post-discovery summary judgment phase, both parties may want to consider the canons of statutory interpretation. Conflicting statutory paradigms often compel courts to interpret statutes such that the application of one law does not nullify the application of another.[149] Here, if the court holds that D&B's reduction of Ms. Marin's hours does not violate ERISA's section 510, it arguably thwarts one of the ACA's principal goals: increasing access to high quality health care. Consequently, it may be important to address whether or not the traditional canons of statutory interpretation perhaps compel the conclusion that Ms. Marin should receive ERISA relief.

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145. If the burden should shift to Ms. Marin, she may find it more difficult to analogize her facts to those in *Arvida Realty Sales*, as her case would, at that point, more closely parallel cases like *Bellaire Corp. Compare* Seaman v. Arvida Realty Sales, 985 F.2d 543, 547 (11th Cir. 1993), *with Bellaire Corp.*, 966 F.2d at 1044.

146. *See, e.g.*, Williams v. Rochling Auto. USA, LLP, No. 7:11-3497-MGL-KFM, 2012 WL 3680770, at *3–4 (D.S.C. Aug. 6, 2012) (explaining a defendant's expressed motivation to reduce healthcare costs did not inoculate it against a section 510 claim if the actions taken to avoid health care costs involved interference with an employee's receipt of ERISA-protected benefits), *report and recommendation adopted*, No. 7:11-3497-MGL-KFM, 2012 WL 3680533 (D.S.C. Aug. 27, 2012).

147. Compl. *supra* note 3, at ¶ 25, 28, 30, 39 (citing Form S−1, *supra* note 52).

148. *Id.* at ¶ 30.

149. *See, e.g.*, King v. Burwell, 135 S.Ct. 2480, 2492 (2015).

VII. CONCLUSION

Ultimately, if Ms. Marin produces evidence establishing the facts she has alleged, it seems likely that she will succeed in the district court on her section 510 ERISA claim. She has alleged a plethora of evidence that should illustrate D&B directly interfered with the attainment of current benefits for the purpose of avoiding the reasonably likely increased future health care costs imposed by the ACA. Additionally, the court may well conclude that the ACA only encourages adjustment to current health benefit plans and that the likelihood of such adjustment in this case created something akin to vested rights in future benefits for Ms. Marin. Even if D&B successfully frames its hours reduction as a lawful business decision to avoid taxes, Ms. Marin may still overcome the final *McDonnell-Douglas* burden. By pointing to D&B's own statements about its specific intent, none of which reference taxes, she may well prove pretext. Finally, statutory canons of interpretation likely compel a conclusion that the application of section 510 does not nullify the application of the ACA.

However, even if the court renders a decision in Ms. Marin's favor, it will likely simultaneously limit its decision to the facts at hand. As a result, other plaintiffs lacking equivalent direct evidence of intent, may find such a favorable decision in this case of little assistance. For example, if a different company were to cut thousands of employees down to part-time status but, in contrast to D&B, never publicly discuss why, such employees may find it impossible—when the company asserts that its primary intent was tax avoidance—to establish such a contention is mere pretext.

Of course, it is always possible that, given the opportunity, the court will go in a totally different direction. It may interpret section 510 narrowly and hold that D&B's hours reduction is properly characterized as a legitimate move to limit future tax liability. Such an outcome would potentially shield any company who similarly reduces hours to avoid increased ACA related health care costs. This could encourage employers to embrace D&B's hours-slashing strategy.[150]

150. Interestingly, while some opponents of the ACA reasoned that the employer mandate would result in only part-time hiring moving forward, recent studies show that there has been little change in part-time employment statistics. *Compare* Jason Pyre, *SeaWorld to limit hours for part-timers to avoid ObamaCare mandates*, UNITED LIBERTY (Sept. 11, 2013), http://www.unitedliberty.org/articles/14902-seaworld-to-limit-hours-for-part-timers-to-avoid-obamacare-mandates, *with* Asako S. Moriya et al., *Little Change Seen in Part-Time Employment as a Result of the Affordable Care Act*, HEALTHAFFAIRS (Jan. 2016), http://content.healthaffairs.org/content/35/1/119.full.

In conclusion, the ACA's employer mandate was championed to expand access to quality healthcare to Americans, yet some businesses have responded by reducing such access in an attempt to avoid triggering the mandate's penalties. In D&B's case, more than 10,000 Americans lost their health care coverage.[151] As this litigation moves beyond the discovery stages, it will be interesting to see what factors the court takes into consideration in determining whether such drastic actions constitute ERISA violations. What more, should the ACA survive the next few years with its employer mandate intact, the result of this case promises to have serious consequences for businesses considering similar cost saving moves in the future.

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151. *See* Vincent, *supra* note 47.

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