# Reducing My Hours? See You in Court!

### Employers that seek to reduce their exposure under the Affordable Care Act's "play or pay" mandate in 2014 by reducing their employees' hours could risk incurring penalties under a section of the Employee Retirement Income Security Act.

By Andrew R. McIlvaine

Employers could be looking at a lot of potential legal trouble in 2014 as the "pay or play" provisions of the Patient Protection and Affordable Care Act take effect. Specifically, some employers that intentionally reduce their employees' hours to avoid having to either offer affordable healthcare coverage or pay a per-employee fine for not doing so could find themselves on the wrong end of a lawsuit or a government sanction.

The ACA mandates that, starting in 2014, all organizations with 50 or more full-time-equivalent employees must either offer healthcare coverage that's deemed "affordable" or else pay penalties of up to $3,000 per employee (minus the first 30 employees in their workforce). The healthcare law defines as "full-time" any employee who works an average of 30 or more hours per week.

A number of employers, particularly those in the retail and fast-food industries, where wages tend to be low and healthcare benefits expensive (if they're offered at all), have indicated they may reduce the hours of their employees to below 30 hours per week in order to avoid the requirement.

At the Society for Human Resource Management's Employment Law & Legislative Conference earlier this month in Washington, participants at a forum on managing the costs associated with the ACA expressed concern about the burden pay or play will have on their organizations' bottom lines.

"How do they expect us to absorb all these extra costs and still stay in business?" one participant asked. Several other participants mockingly referred to the law as the "Unaffordable Care Act."

However, employers seeking to limit their costs under the law will need to tread carefully, say employment-law experts. In particular, they must avoid running afoul of section 510 of the Employee Retirement Income Security Act, which prohibits organizations from making employment decisions specifically to prevent an employee from obtaining or keeping benefits coverage.

"I would not recommend reducing your employees' hours [to avoid the ACA mandate] without getting a signed letter from your benefits attorney first," said Gary Kushner, a Portage, Mich.-based benefits expert who spoke at a session on ACA compliance at the SHRM conference.

"If you plan to reduce the hours of an employee who regularly works 40 hours a week to 29 hours or less per week, then you have to ask yourself whether these employees had a right to healthcare benefits under the previous arrangement," says James Napoli, a benefits attorney at New York-based Proskauer and leader of the firm's

Healthcare Reform Task Force. "If the employee can prove you did this to avoid the ACA requirements and penalties, it could be a section 510 violation."

Section 510 was intended primarily by Congress as a way to prevent employers from taking actions to deny workers access to their vested benefits -- for example, firing workers when they turn 64 so they're not eligible to collect their company pensions when they retire at 65, he says. However, it covers non-vested benefits too, including health benefits, he says.

Employers must also watch out for a whistleblower statute within the ACA that bars them from retaliating against employees who obtain subsidized coverage via a government healthcare exchange, says Napoli. For employers, the "pay" provision of the ACA is triggered when employees qualify for such coverage. For this type of violation, the penalties could be especially severe, he warns.

"Unlike a section 510 violation, violating the whistleblower statute allows a victorious plaintiff to collect damages for pain and suffering in addition to other costs," says Napoli.

Workforce demographics are another area to watch out for, he says.

"Older employees tend to be better paid," says Napoli. "If you cut their hours, you're looking at a potential age-discrimination lawsuit."

Other legal experts are more circumspect as to whether cutting employees' hours to limit ACA-related costs will incur a section 510 penalty.

"I would say it's unclear at this point," says Andy Anderson, an employment attorney at Morgan Lewis. "I think the greatest area of risk for employers in this area would be taking away coverage that individuals are currently receiving."

On a "risk continuum," Anderson says, removing employees who are currently enrolled in an employer-provided health plan represents the greatest section 510-related risk. Adjusting hours downward for employees who aren't currently enrolled in a plan but who are currently eligible for it falls into the middle of that continuum, he says. At the far end of the continuum is "changing the job expectation" of a particular job so future hires will know that they'll never work more than 29 hours per week in that particular position.

"Basically, the further away you get from taking coverage away from people, the less risk you'll have of incurring a section 510 penalty," says Anderson.

Even so, the safest route for employers is to impose hour caps on new hires and future hires only, he says. "Don't impose them on the people who currently work for you, regardless of whether they're currently eligible for benefits or not."

Companies that seek to limit their employees' hours to 29 per week or less should frame their reasons for doing so in a business context, says Sheldon Blumling, a partner with Fisher & Phillips in Irvine, Calif.

"We've been telling our clients to -- in managing this section 510 risk -- be careful about how they go about reducing the hours their employees work," he says. For example, a company that restructures its business to make more use of part-time employees who work less than 30 hours per week and does it such that, through attrition, it has fewer benefits-eligible full-time employees by 2014 will be much less at-risk than if it simply reduces the hours of all employees who are currently eligible for benefits, says Blumling.

Mark Casciari, a partner at Seyfarth Shaw in Chicago, says "it cannot be assumed that there's an automatic section 510 violation" if an employer makes staffing decisions to avoid ACA-related costs.

"If the ACA says you can avoid having to provide coverage if you employ less than 50 full-time workers, then why can't you reduce your workforce accordingly? Why should another law make it illegal if you choose to structure your workforce to have less than 50 full-timers?" he says. "Section 510 applies specifically to employees who are already enrolled in your benefits plan. I think the level of risk turns on the specific facts of each case."

Some employer groups are taking their concerns about ACA's potential costs directly to Congress. Testifying on behalf of the National Restaurant Association on March 13, Tom Boucher, owner and CEO of Great New Hampshire Restaurants Inc., told a House Subcommittee on Health hearing that the ACA -- as currently written -- would have a serious impact on the restaurant industry.

Considering that the restaurant industry's pre-tax profit margins are, on average, only 4 percent to 6 percent, he said, the health mandate will impose significant burdens on restaurant employers. Boucher said he expects that 75 percent of the hourly full-time employees who are eligible for his company's health benefit but not currently enrolled will sign up for it in 2014. That would increase his company's annual health-insurance costs by 40 percent, he said, from $500,000 to $700,000.

Congress must amend the law, he said, to -- among other things -- change its definition of full-time employee from one who works an average of 30 hours per-week to 40 hours per-week.

Should an employer decide to make changes to its employees' hours or its organizational structure to lessen its costs under the ACA, says Napoli, HR should take steps to ensure the process is safeguarded.

"If employees decide to sue in this matter, only the interactions between the employer and its legal counsel will be protected under attorney-client privilege," he says. "Everything else will be accessible to the plaintiffs' attorneys."

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