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## Exploring a New Frontier of Employee Benefits Litigation: Using ERISA to Challenge Hours Cut in Avoidance of the ACA's Employer Mandate

Galen Arkush Ages

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# Exploring a New Frontier of Employee Benefits Litigation: Using ERISA to Challenge Hours Cuts in Avoidance of the ACA's Employer Mandate

Galen Arkush Ages†

*Under the employer mandate of the Patient Protection and Affordable Care Act (“ACA”), applicable large employers who fail to provide affordable, minimum-level health coverage to their full-time employees must pay a substantial tax. This creates an incentive for certain employers to engage in workforce management techniques, including reducing the hours of full-time employees, to avoid the cost of providing minimum-level health coverage or paying the tax. Certain employees at the receiving end of such methods—particularly hours cuts—may be able to raise viable challenges under section 510 of the Employee Retirement Income Security Act, but such plaintiffs will also face a variety of challenges. This Article discusses the employer mandate, the use of workforce management techniques by certain employers to avoid compliance, doctrinal issues relating to section 510 claims, and the first section 510 lawsuit challenging ACA workforce restructuring (which has overcome a motion to dismiss). In light of this discussion, the Article reaches several conclusions regarding the viability of using section 510 to challenge ACA-motivated workforce restructuring, especially reductions of employee hours. Most viable plaintiffs, prior to the adverse action, will have worked full-time for an employer with an existing plan. Plaintiffs’ biggest hurdle will be proving specific intent to interfere with benefit rights. Plaintiffs who cannot do so with direct evidence may struggle to do so with circumstantial evidence—as this will require demonstrating that the employer’s claim to have cut hours in an effort to lower overall labor costs was pretextual. However, if plaintiffs do prevail, they can avail themselves of several meaningful remedies, including injunctive relief, equitable restitution, and possibly surcharge. While President-Elect Donald Trump and the G.O.P. plan to “repeal and replace” the ACA, the process of rolling back this complex and politically explosive law may take years, such that the legal issues raised in the Article are unlikely to disappear overnight.*

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## INTRODUCTION

The Patient Protection and Affordable Care Act (“ACA”) became law on March 23, 2010.<sup>1</sup> Implementation of this “large and sweeping” legislation began in 2010 and is not set to end until 2018.<sup>2</sup> As this Article goes to press, President-Elect Donald Trump and the G.O.P. seem to have settled upon delaying the repeal of the ACA and the implementation of a new health care law for a number of years, based upon “a growing recognition that replacing the health care law will be technically complicated and could be politically explosive.”<sup>3</sup> Thus, while the ACA’s days are numbered, the law will in the meantime continue to raise important legal issues, including those discussed in this Article.

Under the ACA’s employer mandate, applicable large employers who fail to provide affordable, minimum-level coverage to their full-time employees must pay a substantial tax.<sup>4</sup> This creates an incentive for certain employers to engage in workforce management techniques, including reducing the hours of full-time employees, to avoid the cost of providing minimum-level coverage or paying the tax.<sup>5</sup> This Article argues that certain employees at the receiving end of such methods (particularly hours cuts), can raise viable challenges under section 510 of the Employee Retirement Income Security Act (“ERISA”),<sup>6</sup> while also discussing a variety of challenges such plaintiffs will face.

Part I describes how the ACA’s employer mandate functions, which is necessary for understanding the incentives for employers to take measures to avoid compliance costs (either providing appropriate insurance or paying the applicable tax). Part II investigates the extent to which employers have actually opted to engage in such workforce management, particularly by cutting hours. That Part concludes that the phenomenon is probably relatively modest, at least so far, but nonetheless raises important justice and equity concerns. Part III describes various doctrinal issues for section 510 claims: prohibited conduct, application to health care plans, parties within the

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2. *Id.*

3. See Robert Pear, Jennifer Steinhauer, & Thomas Kaplan, *G.O.P. Plans Immediate Repeal of Health Law, Then a Delay*, N.Y. TIMES, Dec. 2, 2016; see also Kenneth B. Schnoll, *Repeal the ACA, you say?* DAILY JOURNAL, Nov. 18, 2016 (discussing the substantial technical, political, and regulatory challenges of repealing the ACA).

4. See *infra* Part 0.

5. See *infra* Part 0.

6. 29 U.S.C. § 1140 (2012).

provision's scope, proving specific intent, statute of limitations, and remedies. Part IV addresses *Marin v. Dave & Buster's, Inc.*, the first section 510 lawsuit challenging ACA workforce restructuring, which has overcome a motion to dismiss. The plaintiff lost her employer-provided health insurance after her employer cut the hours of full-time employees during its nationwide effort to avoid ACA compliance costs. That Part discusses the complaint, motion-to-dismiss briefs, court opinion, and commentary by practitioners. Tying everything together, Part V reflects on the viability of using section 510 to challenge ACA-motivated workforce restructuring (especially hours cuts). Most viable plaintiffs will have, prior to the adverse action, worked full-time for an employer with an existing plan. The biggest hurdle will be proving specific intent to interfere with benefit rights. Plaintiffs that cannot do so with direct evidence may struggle to do so with circumstantial evidence—as this will require demonstrating that the employer's claim to have cut hours in an effort to lower overall labor costs was pretextual. However, if plaintiffs do prevail, they can avail themselves of several meaningful remedies, including injunctive relief, equitable restitution, and possibly surcharge.

## I.

### THE ACA'S EMPLOYER MANDATE

Section 1513(a) of the ACA added the Employer Shared Responsibility Provision (“employer mandate”) as section 4980H of the Internal Revenue Code.<sup>7</sup> The Internal Revenue Service (“IRS”) issued final regulations<sup>8</sup> that became effective on January 1, 2015<sup>9</sup> and provided guidance on the employer mandate. The employer mandate imposes an excise tax<sup>10</sup> on certain large employers who fail to provide “affordable health coverage that provides a minimum level of coverage to their full-time employees (and their dependents).”<sup>11</sup> This excise tax is frequently referred to as the “pay-or-play

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7. I.R.C. § 4980H (2012); see also Lisa Weder, *Employer Shared Responsibility Mandate To Pay or Play? That is the Question*, BENEFITS L. J., Winter 2014, at 56.

8. *Shared Responsibility for Employers Regarding Health Coverage*, 79 Fed. Reg. 8,544 (Feb. 12, 2014); see also 26 C.F.R. §§ 54.4980H-0 to 54.4980H-6 (2015). The IRS has also issued Q&As to help interpret the regulations. *Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act*, IRS (May 20, 2015), <https://www.irs.gov/Affordable-Care-Act/Employers/Questions-and-Answers-on-Employer-Shared-Responsibility-Provisions-Under-the-Affordable-Care-Act> [hereinafter *Employer Shared Responsibility Q&As*] (Answer #1).

9. 26 C.F.R. § 54.4980H-6(b).

10. The excise tax is officially called “an Employer Shared Responsibility payment.” *Employer Shared Responsibility Q&As*, *supra* note 8 (Answer #1).

11. *Id.*

penalty,”<sup>12</sup> referring to the employer’s choice between “play[ing] along and comply[ing] with the regulations or pay[ing] the price of noncompliance.”<sup>13</sup>

The employer mandate only applies to “applicable large employers,”<sup>14</sup> defined “with respect to a calendar year, [as] an employer who employed an average of at least 50 full-time employees [including full-time equivalent employees] on business days during the preceding calendar year.”<sup>15</sup> A “full-time employee” is “with respect to any month, an employee who is employed on average at least 30 hours of service per week.”<sup>16</sup> A “full-time equivalent employee” (“FTE”), is a combination of part-time employees (those employed on average less than 30 hours per week for the employer) “who, in combination, are counted as the equivalent of a full-time employee solely for purposes of determining whether the employer is an applicable large employer.”<sup>17</sup> Accordingly, “an employer that employs 40 full-time employees (that is, employees employed 30 or more hours per week on average), and 20 employees employed 15 hours per week on average has the equivalent of 50 full-time employees, and would be an applicable large employer.”<sup>18</sup> Finally, for the purpose of the employer mandate, hours of services are counted for “each hour for which an employee is paid, or entitled to payment” either because the employee “perform[ed] duties for the employer” or because the employee performed no duties “due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence.”<sup>19</sup>

The pay-or-play penalty may apply to applicable large employers in either of two ways: (1) the employer may be required to pay a “no-offer penalty” under I.R.C. § 4980H(a), or (2) the employer may be required to pay an “unaffordable coverage penalty” under section § 4980H(b).<sup>20</sup> The no-offer penalty applies where the applicable large employer “does not offer health coverage or offers coverage to fewer than 95% of its full-time employees and the dependents of those employees, and at least one of the full-time employees receives a premium tax credit to help pay for coverage” on a

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12. See Kathryn L. Moore, *The Pay or Play Penalty Under the Affordable Care Act: Emerging Issues*, 47 CREIGHTON L. REV. 611, 611 (2014).

13. Weder, *supra* note 7, at 57.

14. I.R.C. § 4980H(a), (b) (2012).

15. I.R.C. § 4980H(c)(2)(A); 26 C.F.R. § 54.4980H-1(4). An exemption applies for certain seasonal workers, I.R.C. § 4980H(c)(2)(B), though seasonal workers are included when calculating full-time equivalent employees, 26 C.F.R. § 54.4980H-2(c).

16. I.R.C. § 4980H(c)(4)(A).

17. 26 C.F.R. § 54.4980H-1(22).

18. *Employer Shared Responsibility Q&As*, *supra* note 8 (Answer #4).

19. *Id.* (Answer #16).

20. Moore, *supra* note 12, at 613.

Health Insurance Marketplace<sup>21</sup> (“Marketplace”).<sup>22</sup> The unaffordable coverage penalty applies where the applicable large employer

offers health coverage to all or at least 95% of its full-time employees, but at least one full-time employee receives a premium tax credit to help pay for coverage on a Marketplace, which may occur because the employer did not offer coverage to that employee or because the coverage the employer offered that employee was either unaffordable to the employee . . . or did not provide minimum value . . . .<sup>23</sup>

Coverage is unaffordable “[i]f an employee’s share of the premium for employer-provided coverage would cost the employee more than 9.5% of that employee’s annual household income.”<sup>24</sup> Since most employers will not know an employee’s household income, the final regulations provide for several optional safe harbors, whereby the employer may, subject to certain conditions, determine affordability based upon the wages reported on the employee’s W-2 tax form, the employee’s rate of pay, or the federal poverty line.<sup>25</sup> Finally, “[a] plan provides minimum value if it covers at least 60

21. A Health Insurance Marketplace is also known as an Affordable Insurance Exchange. *Employer Shared Responsibility Q&As*, *supra* note 8 (Answer #1). See generally 26 C.F.R. § 54.4980H-1(18) (cross-referencing 45 C.F.R. § 155.20 for the definition of exchange); 45 C.F.R. § 155.20 (“Exchange means a governmental agency or non-profit entity that meets the applicable standards of this part and makes QHPs [i.e., Qualified Health Plans] available to qualified individuals and/or qualified employers.”).

22. *Employer Shared Responsibility Q&As*, *supra* note 8 (Answer #18). The full language of section 4980H(a) is as follows:

If—(1) any applicable large employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and (2) at least one full-time employee of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee, then there is hereby imposed on the employer an assessable payment equal to the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

I.R.C. § 4980H(a) (2012); see also 26 C.F.R. § 54.4980H-4 (2015) (assessable payments under section 4980H(a)).

23. *Employer Shared Responsibility Q&As*, *supra* note 8 (Answer #18). The full language of section 4980H(b) is as follows:

If—(A) an applicable large employer offers to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and (B) 1 or more full-time employees of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee, then there is hereby imposed on the employer an assessable payment equal to the product of the number of full-time employees of the applicable large employer described in subparagraph (B) for such month and an amount equal to  $\frac{1}{12}$  of \$3,000.

I.R.C. § 4980H(b) (2012); see also 26 C.F.R. § 54.4980H-5 (2015) (assessable payments under section 4980H(b)).

24. *Employer Shared Responsibility Q&As*, *supra* note 8 (Answer #19); see also 26 I.R.C. § 36B(c)(2)(C)(i) (2012) (affordable coverage); 26 C.F.R. § 54.4980H-5(e) (same).

25. See *Employer Shared Responsibility Q&As*, *supra* note 8 (Answer #19); see also 26 C.F.R. § 54.4980H-5(e)(2) (affordability safe harbors), (e)(2)(i) (conditions for using an affordability safe harbor),

percent of the total allowed cost of benefits that are expected to be incurred under the plan.”<sup>26</sup>

As previously noted, the pay-or-play penalty is only assessed where at least one full-time employee receives a premium tax credit. In general, employees qualify for the premium tax credit to assist with paying for health coverage if they (1) “have household income between 100% and 400% of the federal poverty line,” (2) “enroll in coverage through a Marketplace,” (3) “are not eligible for coverage through a government-sponsored program like Medicaid or CHIP,” and (4) “are not eligible for coverage offered by an employer or are eligible only for employer coverage that is unaffordable or that does not provide minimum value.”<sup>27</sup>

The amount of the payment assessed to an applicable large employer depends upon the specific type of pay-or-play penalty.<sup>28</sup> The no-offer penalty per month “equals the number of full-time employees the employer employed for the month (minus up to thirty) multiplied by one-twelfth of \$2,000.”<sup>29</sup> The unaffordable coverage penalty per month “equals the number of full-time employees who receive a premium tax credit for that month multiplied by 1/12 of \$3,000.”<sup>30</sup> The unaffordable coverage penalty is capped at the amount

(e)(2)(ii) (form W-2 safe harbor), (e)(2)(iii) (rate of pay safe harbor), (e)(2)(iv) (federal poverty line safe harbor), (e)(2)(v) (safe harbor examples).

26. *Employer Shared Responsibility Q&As, supra* note 8 (Answer #20). To determine whether the health coverage provides minimum value, employers must use the actuarial value calculator developed by the Department of Health and Human Services, *see* 45 C.F.R. § 156.135(a) (2015), or one of the alternative methods established by the regulations, *see* 45 C.F.R. § 156.135(b), (d).

27. *Employer Shared Responsibility Q&As, supra* note 8 (Answer #43); *see also* 26 C.F.R. § 54.4980H-1(6) (“The term applicable premium tax credit means any premium tax credit that is allowed or paid under [I.R.C.] section 36B and any advance payment of such credit.”); Moore, *supra* note 12, at 613 (describing circumstances when an employee is eligible for a premium tax credit).

28. *See* Moore, *supra* note 12, at 614.

29. *Employer Shared Responsibility Q&As, supra* note 8 (Answer #24); *see also* 26 C.F.R. § 54.4980H-4(a), (“For the calendar month, the applicable large employer member will owe an assessable payment equal to the product of the section 4980H(a) applicable payment amount and the number of full-time employees of the applicable large employer member (other than employees in a limited non-assessment period for certain employees and as adjusted in accordance with paragraph (e) of this section.”); 26 C.F.R. § 54.4980H-1(41) (“The term section 4980H(a) applicable payment amount means, with respect to any calendar month, 1/12 of \$2,000, adjusted for inflation in accordance with section 4980H(c)(5) and any applicable guidance thereunder.”); 26 C.F.R. § 54.4980H-4(e) (“For purposes of the liability calculation under paragraph (a) of this section, with respect to each calendar month, an applicable large employer member’s number of full-time employees is reduced by that member’s allocable share of 30”).

30. *Employer Shared Responsibility Q&As, supra* note 8 (Answer #25); *see also* 26 C.F.R. § 54.4980H-5(a) (“[T]here is imposed on the applicable large employer member an assessable payment equal to the product of the number of full-time employees of the applicable large employer member for which it has received a Section 1411 Certification (minus the number of those employees in a limited non-assessment period for certain employees and the number of other employees who were offered the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan that satisfied minimum value and met one or more of the affordability safe harbors described in paragraph (e) of this section) and the section 4980H(b) applicable payment amount.”); sources cited *supra* note 25 (regarding affordability safe harbors under § 54.4980H-5(e)); 26 C.F.R. § 54.4980H-1(42) (“The term

of the no-offer penalty, so that an employer will never pay more than it would for offering no coverage at all.<sup>31</sup> Both types of pay-or-play penalty are adjusted for inflation.<sup>32</sup>

The employer mandate took effect on January 1, 2015,<sup>33</sup> but transition relief was available through December 31, 2015. Under the one-year transition relief, the employer mandate was not assessed on employers with on average between 50 and 100 full-time employees (including FTEs) in 2014, so long as those employers did not, between February 9, 2014 and December 31, 2014, either (1) reduce the number of employees or the hours of service to qualify for transition relief, or (2) “eliminate or materially reduce the health coverage, if any,” that these employers provided as of February 9, 2014.<sup>34</sup> In addition, employers were permitted to use any six-month period in 2014 to determine whether they were applicable large employers in 2015,<sup>35</sup> as opposed to the yearlong measurement period that applies for subsequent years.<sup>36</sup> Finally, during 2015, the no-offer penalty could only be assessed on applicable large employers that provided coverage to less than 70 percent of full-time employees (and their dependents), instead of less than 95 percent, and consequently, the unaffordable coverage penalty could come into play for applicable large employers that provided coverage to at least 70 percent of full-time employees (and their dependents), instead of less than 95 percent.<sup>37</sup>

## II.

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section 4980H(b) applicable payment amount means, with respect to any calendar month, 1/12 of \$3,000, adjusted for inflation in accordance with section 4980H(c)(5) and any applicable guidance thereunder.”).

31. *Employer Shared Responsibility Q&As*, *supra* note 8 (Answer #25); *see also* 26 C.F.R. § 54.4980H-5(a) (“[T]he aggregate amount of assessable payment determined under this paragraph (a) with respect to all employees of an applicable large employer member for any calendar month may not exceed the product of the section 4980H(a) applicable payment amount and the number of full-time employees of the applicable large employer member during that calendar month (reduced by the applicable large employer member’s ratable allocation of the 30 employee reduction under § 54.4980H-4(e)).”).

32. I.R.C. § 4980H(c)(5) (2012); 26 C.F.R. § 54.4980H-1(41)-(42).

33. *Employer Shared Responsibility Q&As*, *supra* note 8 (Answer #2); *see also* INTERNAL REVENUE SERVICE, BULLETIN NO. 2013-31, NOTICE 2013-45, TRANSITION RELIEF FOR 2014 UNDER §§ 6055 (§ 6055 INFORMATION REPORTING), 6056 (§ 6056 INFORMATION REPORTING) AND 4980H (EMPLOYER SHARED RESPONSIBILITY PROVISIONS) 116-17 (July 29, 2013), <https://www.irs.gov/pub/irs-irb13-31.pdf> [hereinafter I.R.S. BULLETIN NO. 2013-31, NOTICE 2013-45].

34. *Employer Shared Responsibility Q&As*, *supra* note 8 (Answer #34). There is also transition relief available for new employers (not in existence during 2014) that reasonably expect to employ less than 100 full-time employees (including FTEs) on business days during 2015, and meet certain other requirements. *Id.* (Answer #35).

35. *See id.* (Answer #31).

36. *See id.* (Answer #4); 26 C.F.R. § 54.4980H-2(b)(1).

37. *Id.* (Answer #37). Subject to certain conditions, there is also transition relief for applicable large employers that do not provide minimum essential coverage to all dependents of full-time employees during plan years beginning in 2015, but who took steps during plan years beginning in 2014 to provide such coverage. *Id.* (Answer #33).

## INCENTIVES FOR EMPLOYERS TO ENGAGE IN WORKFORCE RESTRUCTURING

The foregoing discussion of the employer mandate shows that applicable large employers who fail to provide affordable, minimum-level health coverage to their full-time employees (and their dependents) may face substantial penalties. For example, a company with eighty full-time employees that provides no health insurance to its employees during 2016 will be required to pay \$100,000.<sup>38</sup> Thus, employers just above the threshold to qualify as applicable large employers may seek to avoid having to pay the employer mandate by reducing the hours of their employees, terminating their employees, trying to reclassify their employees as independent contractors, or subcontracting their employee's jobs to outside agencies. In short, certain employers may attempt to game the system to avoid costs associated with the employer mandate. Many practitioners<sup>39</sup> and at least one academic<sup>40</sup> have recognized the temptation that employers face to engage in workforce management techniques in avoidance of the employer mandate. In addition, "[r]eports abound that employers have reduced, or plan to reduce, the size of their workforces and/or their employees' hours in order to avoid

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38.  $(80 - 30) * \$2,000 = \$100,000$ .

39. See David Garland, *5 ACA Issues Employers Should Be Following*, LAW360 (Oct. 8, 2014), <http://www.law360.com/articles/585256/5-aca-issues-employers-should-be-following>; Adam Solander, *Trying to Avoid the 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> [hereinafter Solander, *Trying to Avoid the ACA Mandate?*] ("A common response from employers has been to employ certain 'workforce management' techniques to reduce some or all employee hours to below 30 hour per week in order to reduce the number of full-time employees for whom they are responsible under the mandate."); Adam Solander, *Where ERISA and the Affordable Care Act Collide*, LAW360 (Dec. 5, 2013), <http://www.law360.com/articles/489190/where-erisa-and-the-affordable-care-act-collide> [hereinafter Solander, *Where ERISA and the ACA Collide*] ("There is very little doubt, especially in industries that employ large numbers of part-time workers, that the 30 hour classification of 'full-time' employees will increase the number of employees who are eligible for coverage and as a result will increase the cost of the employer's benefits. Being rationale actors, it seems reasonable that employers will generally seek to maximize their staffing in a manner that minimizes the impact of the 30-hour threshold. In some cases, this may mean that to reduce the cost of coverage employers will reduce part-time workers' hours below 30 hours per week and consequently ensure that employees who typically work over 30 hours per week work more hours."); Nick J. Welle & William L. Brown, *May Companies Reduce Hours to Avoid ObamaCare? ERISA Implications of the Affordable Care Act*, WISCONSIN LAWYER, May 2014, <http://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=87&Issue=5&ArticleID=11535> ("To avoid expenses, some employers might consider reducing employees' hours to get around the 'full-time' label and accompanying ACA requirements."); James Napoli & Brian Neulander, *The View From Proskauer: Health Care Reform Litigation Risks — The Intersection of ERISA Section 510 and the Affordable Care Act's Whistleblower Provisions*, PROSKAUER'S ERISA PRACTICE CENTER BLOG (May 31, 2013), <http://www.erisapracticecenter.com/2013/05/31/the-view-from-proskauer-health-care-reform-litigation-risks-the-intersection-of-erisa-section-510-and-the-affordable-care-acts-whistleblower-provisions> ("Employers are currently weighing the costs of ACA compliance against the risks and costs of realigning their workforces to avoid the mandate."); *How the ACA, ERISA § 510, and FLSA § 18C Interact*, MOULDER LAW (Aug. 2013), <http://moulderlaw.com/publications> ("Many employers have discussed a strategy of limiting a certain segment of their workforce's hours of service to less than 30 hours per week so that segment of employees will not count for purposes of the Play or Pay Mandate.").

40. Moore, *supra* note 12, at 622-23.

the pay-or-play mandate.<sup>41</sup> Admittedly, commentators have disagreed on whether,<sup>42</sup> and if so, how much,<sup>43</sup> employers have actually cut employee hours in avoidance of the employer mandate. But on balance, there appears to be a modest pattern of workforce restructuring at least partially driven by the employer mandate.<sup>44</sup> And regardless of the overall trend, there is substantial anecdotal evidence (particularly strong in the public sector) that many employers have already chosen to cut hours in avoidance of costs under the employer mandate.<sup>45</sup> Finally, employers who have not yet acted “might still reduce their employees’ hours in the future once they discover the cost of providing health care.”<sup>46</sup>

Even if this phenomenon turns out to be modest in relation to the entire labor force, workforce restructuring to deprive workers of employer-provided healthcare will have a profound impact on the individual workers who are affected. Moreover, the consequences of cutting hours and denying healthcare would be felt particularly by vulnerable workers. In 2013, the UC Berkeley Labor Center identified 2.3 million workers, representing approximately 1.8 percent of the United States workforce, who were at the

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41. *Id.* at 622; *c.f. Impact of ObamaCare on Jobs: Does ObamaCare Kill Jobs?*, OBAMACARE FACTS, <http://obamacarefacts.com/impact-of-obamacare-on-jobs/> (last visited May 26, 2015) (“As an effect of the new employer mandate some larger firms who have to provide insurance for employees come 2015/2016 are cutting back employee hours to part-time to avoid paying for their health coverage. Other employers have moved workers from part-time to full-time to embrace the law.”).

42. *Compare* Max Ehrenfreund, *No, Obamacare Isn’t Killing Full-Time Jobs, New Evidence Shows*, WASH. POST (Aug. 12, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/08/12/no-obamacare-isnt-killing-full-time-jobs-new-evidence-shows/> (“So far, though, researchers say employers have not changed how they hire and schedule their workers in response to the law.”) *with* Robert King, *Employees Working Fewer Hours Due to Obamacare: Survey*, WASH. EXAMINER (Mar. 25, 2015), <http://www.washingtonexaminer.com/employees-working-fewer-hours-due-to-obamacare-survey/article/2562012> (“Employers are reducing hours to avoid ObamaCare’s employer mandate . . .”).

43. *See* Louis Jacobson, *CEO of Carl’s Jr. says ‘Obamacare has caused millions of full-time jobs to become part-time,’* POLITIFACT (Jan. 23, 2015), <http://www.politifact.com/truth-o-meter/statements/2015/jan/23/andy-puzder/ceo-carls-jr-says-obamacare-has-caused-millions-fu/> (disagreeing with claim by CEO of Carl’s Jr. that “‘Obama has caused millions of full-time jobs to become part-time’” and concluding that the evidence suggests instead that “‘hundreds of thousands of workers may have seen their hours cut as the law’s impact began to be felt’”).

44. *See* Ben Casselman, *Yes, Some Companies Are Cutting Hours in Response to ‘Obamacare,’* FIVETHIRTYEIGHT (Jan. 13, 2015), <http://fivethirtyeight.com/features/yes-some-companies-are-cutting-hours-in-response-to-obamacare/> (concluding, based upon statistical data, that “‘employers are capping workers’ hours to avoid offering health insurance” but that “‘the number of workers affected is fairly small,” most likely in the range of “‘a few hundred thousand workers’”); Jacobson, *supra* note 43.

45. *See* Jed Graham, *Obamacare Employer Mandate: A List of Cuts to Work Hours, Jobs*, INV.’S BUS. DAILY (Sep. 5, 2014), <http://news.investors.com/politics-obamacare/090514-669013-obamacare-employer-mandate-a-list-of-cuts-to-work-hours-jobs.htm> (“[W]e’ve compiled a list of job actions with strong proof that ObamaCare’s employer mandate is behind cuts to work hours or staffing levels. As of September 5th, our ObamaCare scorecard included 450 employers with more than 100 school districts among them.”); Robert Pear, *Public Sector Cuts Part-Time Shifts to Bypass Insurance Law*, N.Y. TIMES (Feb. 20, 2014), [http://www.nytimes.com/2014/02/21/us/public-sector-cuts-part-time-shifts-to-duck-insurance-law.html?\\_r=0](http://www.nytimes.com/2014/02/21/us/public-sector-cuts-part-time-shifts-to-duck-insurance-law.html?_r=0) (“Cities, counties, public schools and community colleges around the country have limited or reduced the work hours of part-time employees to avoid having to provide them with health insurance under the Affordable Care Act, state and local officials say.”).

46. Ehrenfreund, *supra* note 42.

greatest risk for hours reductions because they worked thirty to thirty-six hours per week, earned incomes below 400 percent of the Federal Poverty Level, and did not currently have health coverage through their employer.<sup>47</sup> Although it is still too soon to determine whether these predictions will be borne out,<sup>48</sup> they are certainly worrisome for the subset of low-wage workers who would be impacted. Denying healthcare to such workers is particularly significant in light of research that low-wage workers suffer from “increased rates of high blood pressure and high levels of stress, as well as shorter life expectancy.”<sup>49</sup> Moreover, there are additional equity concerns where people of color are overrepresented among low-wage workers. For example, in California 56 percent of low-wage workers are Latinos, compared with 39 percent of the overall workforce.<sup>50</sup>

### III.

#### DOCTRINAL ISSUES FOR SECTION 510 CLAIMS

This Part describes the following doctrinal issues for section 510 claims: (a) retaliatory and discriminatory conduct prohibited by section 510’s “interference clause”; (b) section 510’s application to health care plans; (c) plaintiffs within the scope of section 510; (d) defendants within the scope of section 510; (e) proving specific intent to interfere with benefit rights with direct and circumstantial evidence; (f) statute of limitations; and (g) available remedies.

##### *A. Conduct Prohibited by Section 510*

“Section 510 of ERISA is an anti-discrimination and anti-retaliation statute protecting participants and beneficiaries from losing their present or future benefits by protecting the employment relationship.”<sup>51</sup> The “interference clause” of section 510 reads as follows:

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47. DAVE GRAHAM-SQUIRE & KEN JACOBS, UC BERKELEY LAB. CTR., DATA BRIEF, WHICH WORKERS ARE MOST AT RISK OF REDUCED WORK HOURS UNDER THE AFFORDABLE CARE ACT? 1-2 (2013), <http://laborcenter.berkeley.edu/which-workers-are-most-at-risk-of-reduced-work-hours-under-the-affordable-care-act/>. These workers were highly concentrated in industries such as Accommodation, Building Services, Nursing Homes, Restaurants, and Retail Trade—with the latter two industries accounting for a whopping 47 percent of this most vulnerable group. *Id.* at 1.

48. Miranda Dietz, *Are California Employers Cutting Hours to Avoid Providing Health Care Benefits?*, UC BERKELEY LAB. CTR. BLOG (June 18, 2015), <http://laborcenter.berkeley.edu/are-california-employers-cutting-hours-to-avoid-providing-health-benefits/> (“As the employer penalties begin to go into effect, we will see if our predictions hold true that only a small subset of low-wage workers see hours reductions.”).

49. See *Low-Wage Work in California: 2014 Chartbook*, UC BERKELEY LAB. CTR., <http://laborcenter.berkeley.edu/lowwageca/#6.ACloserLookatLow-WageIndustriesandOccupations> (last visited May 25, 2016).

50. See *id.*

51. JEFFREY LEWIS ET AL., EMPLOYEE BENEFITS LAW § 2.IV.A (3d ed. 2012).

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, [or] this subchapter . . .<sup>52</sup>

The inquiry in section 510 claims is not whether the defendant abided by the terms of the employee benefit plan (the inquiry in a section 502(a)(1)(B) case), but instead whether the defendant acted to deny or impede a “participant’s ability to collect present or future benefits” or to “punish a participant for exercising his or her rights under an employee benefit plan.”<sup>53</sup> This critical distinction means that section 510 cases do not depend upon whether a participant qualified for the benefits of the plan, but instead upon whether the defendant impeded a “participant’s ability to meet these qualifications in the first instance.”<sup>54</sup>

### *B. Section 510’s Application to Cases Involving Health Insurance Plans*

The Supreme Court has held section 510 applies to both vested and unvested rights under both pension benefit plans and welfare benefit plans.<sup>55</sup> Welfare benefit plans include employer-provided health insurance,<sup>56</sup> so long as the health insurance plan is an ERISA plan.<sup>57</sup> Thus, health insurance coverage may be the subject of a viable section 510 claim.<sup>58</sup>

52. 29 U.S.C. § 1140 (2012). Subchapter I (Protection of Employee Benefit Rights), encompasses §§ 1001-1191c. These sections include ERISA’s general provisions and regulatory provisions, including the Part 1 (Reporting and Disclosure), Part 2 (Participation and Vesting), Part 3 (Funding), Part 4 (Fiduciary Responsibility), Part 5 (Administration and Enforcement), Part 6 (Continuation of Coverage and Additional Standards for Group Health Plans) and Part 7 (Group Health Plan Requirements). Section 1201 deals with procedures in connection with the issuance of certain determination letters by the Secretary of the Treasury covering qualifications under Internal Revenue Code. I have omitted interference clause references to the Welfare and Pensions Disclosure Act, 29 U.S.C. § 301, because ERISA repealed the WPDA as to any events taking place on or after January 1, 1975, which makes the WPDA irrelevant four decades later. *See* Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, §§ 111(a)(1), (b)(1), 88 Stat. 829 (1974); *see also* 29 U.S.C. § 1031(a)(1), (b)(1).

53. *Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129, 1134 (7th Cir. 1992).

54. *Id.*; *see also* *Eichorn v. AT&T Corp.*, 484 F.3d 644, 652-53 (3d Cir. 2007).

55. *Inter-Modal Rail Emps. Ass’n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 514 (1997).

56. *See* 29 U.S.C. § 1002(1) (2012) (stating that welfare benefit plans include an employer health plan “established or . . . maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, . . . medical, surgical, or hospital care or benefits”).

57. *E.g.*, *Sofa v. Pan-Am. Life Ins. Co.*, 13 F.3d 239, 241 (7th Cir. 1994) (finding that the employer-provided health insurance plan was an ERISA plan under 29 U.S.C. § 1002(1), having met several requirements).

58. *See, e.g.*, *Seaman v. Arvida Realty Sales*, 985 F.2d 543, 545 (11th Cir. 1993) (reversing dismissal of section 510 claim where plaintiff’s “health insurance coverage was not vested”).

*C. Plaintiffs within the Scope of Section 510*

Section 510's plain language establishes that a plaintiff may be a "participant or beneficiary."<sup>59</sup> Section 3 defines "participant" as "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer . . . or whose beneficiaries may be eligible to receive any such benefit."<sup>60</sup> To demonstrate "that he or she 'may become eligible' for benefits, a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future."<sup>61</sup> Finally, Section 3(8) defines "beneficiary" as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder."<sup>62</sup>

Some but not all circuit courts have awarded standing under section 510 to employees and former employees who "would have been participants in a plan but for the adverse employer action, where the employer acted for the purpose of preventing the plaintiff from becoming a participant."<sup>63</sup> In *McBride v. PLM International, Inc.*, the Ninth Circuit held that the former employee had standing to sue under section 510, even though he had been discharged and his employee benefit plan had been terminated.<sup>64</sup> Although determining ERISA standing based upon conditions at the time the lawsuit is filed is usually sensible, doing so there would have undermined the remedial purpose of section 510.<sup>65</sup> The court reasoned, "[d]epriving a plaintiff of standing to sue under ERISA for his employer's clear violation of section 1140 [ERISA, § 510] would, in effect, make standing contingent upon the occurrence of subsequent events entirely within the control of the employer."<sup>66</sup> Instead, the court held that a section 510 plaintiff has standing where, "but for the employer's conduct alleged to be in violation of ERISA, the [plaintiff] would be a current employee with a reasonable expectation of receiving benefits, and the employer should not be able through its own malfeasance to defeat the [plaintiff]'s standing."<sup>67</sup> Similarly, in *Christopher v. Mobil Oil Corp.*, the Fifth Circuit found that the plaintiffs had standing where "their allegations . . . suggest[ed] . . . that they were constructively discharged in violation of section 510 and that but for [the defendant]'s nondisclosure they would be covered employees with standing to challenge

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59. 29 U.S.C. § 1140.

60. 29 U.S.C. § 1002(7).

61. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117-18 (1989).

62. 29 U.S.C. § 1002(8).

63. LEWIS ET AL., *supra* note 51, § 15.IX.C.1.

64. 179 F.3d 737, 740, 742-44 (9th Cir. 1999).

65. *Id.* at 743.

66. *Id.* at 743.

67. *Id.*

the plan amendment.”<sup>68</sup> But in *Feldman v. American Memorial Life Insurance Co.*, the Seventh Circuit held that the plaintiff failed to “establish a *prima facie* case under § 510 of ERISA because she was not a member of the protected class for long-term disability benefits.”<sup>69</sup> There, the employer had terminated the plaintiff the day after she had medical authorization to return to work, and two days before she would have become entitled to long-term disability benefits.<sup>70</sup>

Independent contractors present a nuanced standing issue. The Supreme Court has adopted the common-law test for determining “employee” status under ERISA,<sup>71</sup> so independent contractors logically cannot qualify as “employees” under ordinary circumstances. Accordingly, courts have found that independent contractors ordinarily lack standing to bring claims under section 510.<sup>72</sup> However, the Eleventh Circuit found that section 510 would be violated if the defendant had reclassified the plaintiffs and others similarly situated as independent contractors with the specific intent to interfere with their ability to accrue future ERISA benefits.<sup>73</sup>

#### D. Defendants Within the Scope of Section 510

The broad definition of “person” under ERISA extends to “virtually every . . . kind of business entity.”<sup>74</sup> Specifically, section 3 of ERISA defines “person” as “an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.”<sup>75</sup> Accordingly, nearly all employers are potentially fair game as section 510 defendants.

#### E. Proving Specific Intent with Direct or Circumstantial Evidence

To prevail in a section 510 case, the plaintiff must prove that the defendant acted with specific intent to violate ERISA by interfering with the plaintiff’s benefit rights.<sup>76</sup> The plaintiff may present “*direct* ‘smoking gun’

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68. See 950 F.2d 1209, 1223 (5th Cir. 1992).

69. 196 F.3d 783, 792 (7th Cir. 1999).

70. *Id.* at 787, 792.

71. See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (U.S. 1992). As the Court observed in *Darden*, “ERISA’s nominal definition of ‘employee’ as ‘any individual employed by an employer,’ 29 U.S.C. § 1002(6), is completely circular and explains nothing.” *Id.*

72. See *Dykes v. DePuy, Inc.*, 140 F.3d 31, 35-37, 39 & n.2, (1st Cir. 1998); *Speen v. Crown Clothing Corp.*, 102 F.3d 625, 628, 634 (1st Cir. 1996), *as amended* (Jan. 22, 1997); see also LEWIS ET AL., *supra* note 51, § 15.IX.C.1 (“Courts have held that independent contractors and leased employees lacked standing under Section 510 to challenge the termination of their business relationships as interfering with their benefits.”).

73. *Gitlitz v. Compagnie Nationale Air France*, 129 F.3d 554, 556, 559-60 (11th Cir. 1997) (reversing and remanding section 510 claim).

74. LEWIS ET AL., *supra* note 51, § 10.II.A n.14.

75. 29 U.S.C. § 1002(9).

76. *Dister v. Cont’l Grp., Inc.*, 859 F.2d 1108, 1111 (2d Cir. 1988); *Gavalik v. Cont’l Can Co.*, 812 F.2d 834, 851 (3d Cir. 1987); see also LEWIS ET AL., *supra* note 51, § 15.IX.D (citing *Dister* and *Gavalik*

evidence that the employer acted with discriminatory motivation.”<sup>77</sup> Since such evidence is usually not available, the plaintiff may instead prove specific intent with circumstantial evidence,<sup>78</sup> in which case courts apply the *McDonnell Douglas* burden-shifting formula used to analyze indirect evidence of discriminatory intent in Title VII cases.<sup>79</sup>

Under the burden-shifting formula, the plaintiff must first meet “the burden of proving by the preponderance of the evidence a prima facie case of discrimination.”<sup>80</sup> To set forth this prima facie case, the plaintiff must show “(1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled.”<sup>81</sup> Proving the prima facie case triggers a presumption of unlawful discrimination by the defendant.<sup>82</sup> Then the burden shifts to the defendant to “rebut that presumption by producing evidence of a legitimate, nondiscriminatory reason [‘LND R’] for its actions toward the plaintiff.”<sup>83</sup> At this stage, the defendant bears only the burden of production, not persuasion.<sup>84</sup> If the defendant meets this burden of production, then the burden shifts back to the plaintiff to show that the proffered LND R was “pretext for discrimination.”<sup>85</sup> The plaintiff may do so in either of two ways: (1) “directly by persuading the court that a discriminatory reason more likely motivated the employer”; or (2) “indirectly by showing that the employer’s proffered explanation is unworthy of credence.”<sup>86</sup>

Section 510 cases involving workforce restructuring have reached different results, depending on whether the court found specific intent to interfere with benefit rights.<sup>87</sup> For example, in *Pennington v. West Atlas, Inc.*, the Sixth Circuit affirmed the judgment for plaintiffs in a section 510 case where the plaintiffs had been terminated as part of a reduction of force, rejecting the defendant’s arguments that any interference with employee benefits was merely incidental to the layoffs.<sup>88</sup> The plaintiffs established the

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as seminal specific intent cases); Glenn Sulzer, *ERISA Shadows “big time fun” at Dave & Buster’s*, HEALTH REFORM WK-EDGE (Mar. 4, 2016), [http://www.dailyreportingsuite.com/healthreform/news/erisa\\_shadows\\_big\\_time\\_fun\\_at\\_dave\\_buster\\_s](http://www.dailyreportingsuite.com/healthreform/news/erisa_shadows_big_time_fun_at_dave_buster_s) (same).

77. *Gavalik*, 812 F. 2d at 853 (emphasis in original).

78. *Id.* at 852.

79. *See Dister*, 859 F.2d at 1111 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973)).

80. *See id.*

81. *Gavalik*, 812 F.2d at 852.

82. *See Dister*, 859 F.2d at 1112.

83. *Id.*

84. *See id.*

85. *Id.* at 1111-12.

86. *Id.* at 1112.

87. *See LEWIS ET AL.*, *supra* note 51, § 15.IX.F (discussing plant closings, reorganizations, and reductions in force).

88. 202 F.3d 902, 906-11 (6th Cir. 2000).

prima facie case because the elderly plaintiffs were discharged soon before reaching the requisite age for receipt of full retirement benefits.<sup>89</sup> The court underlined that the defendant knew that the reduction in force would interfere with employee retirement benefits (including the plaintiffs' benefits)—as evidenced by (1) the company spreadsheet listing potential employees for layoffs along with their ages, benefits program information, and smoking status; (2) the company president's statement that he "wanted to reduce salaries and medical costs . . . [and] was not concerned about lawsuits"; and (3) expert testimony that the reduction in force disproportionately impacted workers over fifty.<sup>90</sup> Moreover, the plaintiffs offered sufficient evidence to support the trial court's determination that the defendant's LNDRs, such as low performance, were pretextual.<sup>91</sup>

In contrast, courts have typically found no violation of section 510 where the workforce restructuring was motivated by general cost concerns.<sup>92</sup> For example, in *Apsley v. Boeing Co.*, the Eleventh Circuit affirmed the district court's summary judgment ruling for defendants,<sup>93</sup> finding that Boeing's sale of its Wichita Division to Spirit did not violate section 510, even though it resulted in pension cost savings, because the companies did not study the Division's pension costs and worker demographic information until after agreeing to the sale.<sup>94</sup> The court rejected the plaintiffs' arguments that the companies engaged in a "scheme to get rid of older workers for pension-based reasons," and accepted as not pretextual the defendants' LNDR that they intended to achieve cost savings by employing less workers and paying lower salaries.<sup>95</sup>

As illustrated by *Apsley*, the issue of cost savings often arises at the pretext phase of burden shifting.<sup>96</sup> As the Fourth Circuit has recognized, pretext is not established simply by showing that the defendant "acted to save

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89. *Id.* at 907-08.

90. *Id.* at 908-09.

91. *Id.* at 910; *see also* *Millsap v. McDonnell Douglas Corp.*, 162 F. Supp. 2d 1262, 1298-1307 (N.D. Okla. 2001) (holding that defendant violated section 510 by closing the plant with disproportionately older employees, where the defendant knew that doing so would prevent many employees from reaching the age threshold for increased benefits, thus saving the company \$24.7 million more than the \$19 million the sale would have otherwise saved, and where the defendant's LNDRs were not credible).

92. *See* LEWIS ET AL., *supra* note 51, § 15.IX.F.

93. 691 F.3d 1184, 1193 (10th Cir. 2012) (stating district court's disposition); *id.* at 1211 (stating appellate court's disposition).

94. *Id.* at 1208-09; *see also* *Daughtrey v. Honeywell*, 3 F.3d 1488, 1492 (11th Cir. 1993) (affirming summary judgment for defendant that closed facility and laid off workers to reduce operating costs, despite "incidental loss of benefits" (citation omitted)).

95. *Apsley*, 691 F.3d at 1209; *see also* *Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 239 (4th Cir. 1991) (finding that plaintiff did not establish that the defendant's LNDR was pretextual, where defendant saved money, including pension costs, by terminating the plaintiff, but the plaintiff presented no evidence that the defendant harbored "unlawful intent").

96. *See also* *Conkwright*, 933 F.2d at 239 (discussing cost savings in pretext phase).

money.”<sup>97</sup> Similarly, the Eleventh Circuit has found that general cost-cutting is not pretextual, even when producing “incidental” savings on employee benefits.<sup>98</sup> To overcome the LNDR that the defendant merely acted to reduce general costs, the plaintiff must “introduce evidence suggesting that the employer’s decision was directed at ERISA rights in particular.”<sup>99</sup>

#### F. Statute of Limitations

ERISA does not specify a statute of limitations for section 510 claims, so courts apply the “most analogous limitations period” from state law.<sup>100</sup> Frequently, this is the state limitations period for wrongful discharge—but the federal courts have also applied other state limitations periods, such as those for breach of contract, wage claims, or interference with statutory rights.<sup>101</sup> Predicting the limitations period in section 510 cases is further complicated because the federal courts have sometimes applied more than one limitations period for the same state, and have never decided the most analogous limitations period for many states.<sup>102</sup> As of 2015, the federal courts had selected a limitations period between one year and six years for all but one state for which they decided the issue.<sup>103</sup> In summary, the limitations period for section 510 claims varies widely by state, is often unpredictable, and can be quite short—which poses considerable challenges for plaintiffs.

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97. *Id.* at 239.

98. *See Daughtrey*, 3 F.3d at 1492; *see also* *Millsap v. McDonnell Douglas Corp.*, 162 F. Supp. 2d 1262, 1299 (N.D. Okla. 2001) (“Every time an employee closes part of its business, savings on employee benefits will be realized. That is not unlawful. Plaintiffs must show more than that [Defendant] closed the Tulsa plant to save money.”).

99. *Daughtrey*, 3 F.3d at 1492 (citation and internal quotation marks omitted) (finding that plaintiff failed to rebut evidence that the defendant closed the facility and laid off the employees who worked there to reduce operating costs); *see also* *Sulzer*, *supra* note 76 (“[A] plaintiff must prove more than monetary savings in order to prevail in an ERISA Sec. 510 claim. The ‘something more’ element that must be shown is a causal link between the ERISA protected benefit and the employer’s allegedly discriminatory status.” (citation omitted)).

100. ZANGLEIN ET AL., *ERISA LITIGATION* § 12.III.D (5th Ed., 2015); *see also* *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237, 1241 (11th Cir. 1989) (“ERISA does not contain a statute of limitations for section 510 actions. When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a state time limitation as federal law if it is not inconsistent with federal law or policy to do so.”) (citing *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985)).

101. ZANGLEIN ET AL., *supra* note 100 & Fig. 12-2.

102. *Id.*

103. *Id.*, Fig. 12-2. Georgia is the outlier, where a statute of limitations of twenty years applies to the equitable enforcement of statutory rights in section 510 cases. *See Clark*, 865 F.2d at 1242 (adopting the limitations periods of GA. CODE ANN. § 9-3-22 for ERISA § 510 claims, and thereby finding that recovery of wages was barred by the two-year limitations period, but reinstatement was not barred by the twenty-year limitations period).

### G. Remedies

Section 510 explicitly states that it is enforced by the provisions of section 502.<sup>104</sup> Whereas section 502(a)(1)(B) is limited to “rights . . . under the terms of the plan,” and section 502(a)(2) is limited to relief for fiduciary breach under section 409, section 502(a)(3)—the so-called catch-all provision—authorizes “appropriate equitable relief” for violations of ERISA.<sup>105</sup>

Violations of section 510 are enforceable via section 502(a)(3), “which authorizes ‘appropriate equitable relief’ to remedy violations of ERISA, including Section 510.”<sup>106</sup>

The U.S. Supreme Court has held that section 502(a)(3)’s use of “appropriate equitable relief” embraces “those categories of relief that, traditionally speaking (*i.e.*, prior to the merger of law and equity) were typically available in equity.”<sup>107</sup> The remainder of this subsection discusses whether various types of remedies are available under section 502(a)(3). Much of the relevant case law did not arise under section 510 but is nonetheless apposite because it interprets what relief is available under section 502(a)(3).

#### 1. Money Damages

The straightforward payment of money is generally not considered traditional equitable relief. In *Mertens v. Hewitt Associates*, the Court held that “appropriate equitable relief” did not include compensatory damages—that is, monetary losses suffered by the plan because of the defendant’s alleged breach of fiduciary duties.<sup>108</sup> The Court declared, “Money damages are, of course, the classic form of *legal* relief.” Similarly, in *Great-West Life & Annuity Insurance Co. v. Knudson*, the Court reiterated that payment of money is usually a legal remedy, not an equitable remedy: “Almost invariably suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for ‘money damages,’ as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant’s breach of legal duty.”<sup>109</sup> The Court repeated its view from *Mertens* that

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104. 29 U.S.C. § 1140 (2012) (“The provisions of section 1132 of this title shall be applicable in the enforcement of this section.”).

105. See *id.* § 1132(a)(1)-(3). Specifically, section 502(a)(3) provides, “A civil action may be brought— . . . (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.” 29 U.S.C. 1132(a)(3).

106. LEWIS ET AL., *supra* note 51, § 15.IX.G.3.

107. CIGNA Corp. v. Amara, 563 U.S. 421, 439 (2011) (citations omitted).

108. 508 U.S. 248, 255 (1993).

109. 534 U.S. 204, 210 (2002) (quotation marks, ellipsis, and citation omitted).

money damages were quintessential *legal* relief.<sup>110</sup> Nevertheless, payment of money is actually considered traditional equitable relief under certain circumstances, as clarified below.

## 2. *Reformation*

The Court has recognized that the reformation of contracts is a traditional equitable remedy that may be used to correct mistake or fraud.<sup>111</sup>

## 3. *Equitable Estoppel*

Estoppel is a traditional equitable remedy that holds the defendant to promises regarding the plan, and “operates to place the person entitled to its benefit in the same position as he would have been had the representations been true.”<sup>112</sup> Thus, equitable estoppel encourages “fair dealing” and condemns “fraudulent misrepresentation.”<sup>113</sup> In order to receive this remedy, plaintiffs must show detrimental reliance.<sup>114</sup>

## 4. *Surcharge*

The Court held in *Cigna Corp. v. Amara* that surcharge is a traditional equitable remedy that provides “monetary ‘compensation’ for a loss resulting from a trustee’s breach of duty, or to prevent the trustee’s unjust enrichment.”<sup>115</sup> At equity, surcharge was “exclusively equitable” and “extended to a breach of trust committed by a fiduciary encompassing any violation of a duty imposed on that fiduciary.”<sup>116</sup> Indeed, the Court distinguished the facts of *Amara* from *Mertens* based upon fiduciary status: while both cases involved payment of money as “make-whole relief,” the “critical difference” was that in *Amara*, unlike *Mertens*, the defendant was “analogous to a trustee.”<sup>117</sup> Thus, *Amara* suggests that the availability of monetary relief for a violation of section 510 is likely to turn on the fiduciary or non-fiduciary status of the defendant.<sup>118</sup> Indeed, since *Amara*, the Fourth,

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110. *Id.* (citing *Mertens*, 508 U.S. at 255).

111. *See Amara*, 563 U.S. at 440.

112. *See id.*

113. *See id.*

114. *Id.* at 443.

115. *Id.* at 441.

116. *Id.* at 442 (citation and quotation marks omitted).

117. *Id.* at 442. In *Mertens v. Hewitt Associates*, 508 U.S. 248, 249-50, 255 (1993), the Court found that ERISA did not authorize suits for monetary damages against *nonfiduciaries* who knowingly participate in a fiduciary’s breach of duty. In *Amara*, the Court found that several remedies, including surcharge, were traditional equitable relief, where the plan *fiduciary* (employer) had provided incomplete and misleading information regarding the less generous benefits that plan beneficiaries (retired employees) would receive under the new pension plan, in violation of several of ERISA’s notice provisions. 563 U.S. at 424-32, 442.

118. *E.g.*, *Kenseth v. Dean Health Plan, Inc.*, 722 F.3d 869, 880 (7th Cir. 2013) (“Monetary compensation is not automatically considered ‘legal’ rather than ‘equitable.’ The identity of the defendant

Fifth, Seventh, and Ninth Circuits have all found that make-whole relief was available under section 502(a)(3).<sup>119</sup> Yet in each of those cases, the surcharge remedy was sought against a plan fiduciary for alleged breach of fiduciary duty.<sup>120</sup>

Finally, the Court in *Amara* held that surcharge will not be awarded under section 502(a)(3) without a showing of “actual harm.”<sup>121</sup> However, actual harm can simply be the “loss of a right protected by ERISA or its trust-law antecedents” and need not meet the “more rigorous standard” of “detrimental reliance.”<sup>122</sup>

### 5. Restitution

Restitution is also a form of traditional equitable relief.<sup>123</sup> However, not all forms of restitution were available in equity.<sup>124</sup> Specifically, equitable restitution seeks “to impose a constructive trust or equitable lien on ‘particular funds or property in the defendant’s possession.’”<sup>125</sup> Thus, the Court in *Sereboff* found restitution seeking funds in the defendant’s possession was equitable, but reached the opposite result in *Knudson* because that restitution sought funds not in the defendant’s possession.<sup>126</sup> Although both cases alleged breach of contract and sought money, the critical difference was whether the restitution at issue sought “to recover a particular fund from the defendant.”<sup>127</sup>

Similarly, in *Schwartz v. Gregori*, the Sixth Circuit affirmed the award of back pay in a section 510 case where the plaintiff suffered retaliatory discharge to prevent her exercise of an ERISA right.<sup>128</sup> The court reasoned that the back pay was awarded against the employer—not a third party—and

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as a fiduciary, the breach of a fiduciary duty, and the nature of the harm are important in characterizing the relief.”)

119. LEWIS ET. AL., *supra* note 51, § 10.IV.C.2.B (citing *McCravy v. Metro. Life Ins. Co.*, 690 F.3d 176 (4th Cir. 2012); *Gearlds v. Entergy Servs., Inc.*, 709 F.3d 448 (5th Cir. 2013); *Kenseth v. Dean Health Plan, Inc.*, 722 F.3d 869 (7th Cir. 2013); *Skinner v. Northrop Grumman Ret. Plan B*, 673 F.3d 1162 (9th Cir. 2012)).

120. See *McCravy*, 690 F.3d at 181-82 (surcharge could be available in beneficiary’s breach of fiduciary duty claim against trustee for loss of life insurance proceeds); *Gearlds*, 709 F.3d at 452 (surcharge could be available in former employee’s breach of fiduciary claim against former employer for affirmative representations relating to medical benefits); *Kenseth*, 722 F.3d at 880-83 (surcharge could be available in suit against plan fiduciary for breach of fiduciary duty due to misrepresentations about medical benefits); *Skinner*, 673 F.3d at 1167 (surcharge could be available against administrative committee for fiduciary breach).

121. *Amara*, 563 U.S. at 444.

122. *Id.*

123. See *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 255 (1993).

124. *Sereboff v. Mid Atlantic Med. Servs., Inc.*, 547 U.S. 356, 362 (2006) (citing *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212 (2002)).

125. *Id.* (citing *Knudson*, 534 U.S. at 213).

126. *Id.* at 362-63 (citing *Knudson*, 534 U.S. at 213-14).

127. *Id.* at 363.

128. 45 F.3d 1017, 1022-23 (6th Cir. 1995).

therefore functioned “to restore to the plaintiff that which she would have enjoyed but for the employer’s illegal retaliation.”<sup>129</sup> Therefore, the back pay qualified as restitution, and was thus appropriate equitable relief under section 502(a)(3).<sup>130</sup> The Tenth Circuit, however, has declared that (1) back pay is not restitution because “the nature of the remedy is to compensate and *not* to prevent unjust enrichment,” and (2) even if back pay is restitution, it is *legal* restitution, not *equitable* restitution, because the relief is measured with relation to the plaintiff’s loss, not the defendant’s wrongful gain.<sup>131</sup>

### 6. Injunction

The text of section 502(a)(3)(A) explicitly authorizes civil actions to enjoin acts that violate ERISA,<sup>132</sup> including section 510.<sup>133</sup> The U.S. Supreme Court has also held that injunctions are “appropriate equitable relief” under section 502(a)(3).<sup>134</sup> However, courts must “look beyond the label on the remedy and ask whether its substance is equitable or legal,” to avoid awarding “legal remedies-in-equitable-clothing, such as an ‘injunction’ to pay damages.”<sup>135</sup> Applying this approach, the Tenth Circuit found that retroactive reinstatement of health care coverage was “appropriate equitable relief” under section 502(a)(3), where the participant’s trade organization breached its fiduciary duty by terminating his employer’s membership in the insurance trust that provided him with health insurance, just before he submitted an expensive insurance claim for cancer treatment.<sup>136</sup> The court recognized that retrospective remedies are typically legal, not equitable.<sup>137</sup> However, the court reasoned that if the employer were able to continue paying the premiums on the policy, the remedy would have a prospective impact of enabling employees to have future health coverage.<sup>138</sup> The court declared that reinstatement of health care coverage, while likely having the practical effect of reimbursing the plaintiff for his past losses, was really meant to reverse the “unlawful gain” reaped by the trade association in

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129. *Id.*

130. *Id.*

131. *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246, 1255 n.9 (10th Cir. 2004).

132. Section 502 provides in part, “A civil action may be brought . . . (3) by a participant, beneficiary, or fiduciary (A) to *enjoin any act or practice which violates any provision of this subchapter* or the terms of the plan . . .” 29 U.S.C. 1132 (emphasis added).

133. See ERISA LITIGATION: INTERFERENCE WITH PROTECTED RIGHTS (SECTION 510), PRACTICAL LAW PRACTICE NOTE 6-593-2705, at \*15 (Westlaw 2016) (stating that section 502(a)(3) provides for both injunction of ERISA violations and for “appropriate equitable relief”).

134. See *CIGNA Corp. v. Amara*, 563 U.S. 421, 440 (2011) (citing *Mertens v. Hewitt Associates*, 508 U.S. 248, 255 (1993) (“[T]he text of ERISA leaves no doubt that Congress intended ‘equitable relief’ to include only those types of relief that were typically available in equity, such as injunction, mandamus, and restitution.”)).

135. *Phelan v. Wyo. Associated Builders*, 574 F.3d 1250, 1254 (10th Cir. 2009).

136. *Id.* at 1251, 1254-55.

137. *Id.* at 1255.

138. *Id.*

wrongfully terminating the plan and not “paying *all* potential . . . claims” by participants in that employer’s plan.<sup>139</sup>

Similarly, a monetary award may be equitable if “incidental to or intertwined with injunctive relief.”<sup>140</sup> In *Millsap v. McDonnell Douglas Corp.*, the Tenth Circuit applied this test in considering back pay as a remedy for defendant’s closure of a plant in violation of section 510.<sup>141</sup> The Tenth Circuit reversed the lower court’s award of over \$90 million in back pay, finding the back pay was not “incidental” to the claim for reinstatement of employment (dismissed by the lower court) and that “[section] 502(a)(3) does not intertwine equitable relief with legal relief.” Thus, even though reinstatement was a form of injunctive (i.e., equitable) relief,<sup>142</sup> the court held that the back pay award was impermissible as an independent form of legal relief.<sup>143</sup> However, other courts have identified back pay as an appropriate equitable remedy under section 502(a)(3).<sup>144</sup>

#### 7. Emotional Distress and Punitive Damages

“Consistent with ERISA decisions involving other claims, emotional distress and punitive damages are not recoverable under Section 510.”<sup>145</sup>

### IV.

#### MARIN V. DAVE & BUSTER’S, INC.: A NOVEL CASE ON SECTION 510 AND THE

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139. *Id.* (emphasis in original).

140. *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246, 1255 (10th Cir. 2004) (citing *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570-71 (U.S. 1990)).

141. *Id.* at 1254-57.

142. *Id.* at 1255 n.8 (“The remedy of reinstatement is essentially injunctive relief. The Court has made ‘clear that judgments compelling employment, reinstatement, or promotion are equitable.’”) (citations omitted).

143. *Id.* at 1257.

144. *See, e.g., Sandberg v. KPMG Peat Marwick, L.L.P.*, 111 F.3d 331, 336 (2d Cir. 1997) (identifying back pay and restitution as appropriate equitable remedies under section 502(a)(3)) (citing *Russell v. Northrop Grumman Corp.*, 921 F. Supp. 143, 150-53 (E.D.N.Y. 1996); *see also supra* Part 5 (discussing back pay as equitable restitution under section 502(a)(3)); *Greenburg v. Life Ins. Co. of N. Am.*, No. C 08-03240 JW, 2009 WL 1110331, at \*3 (N.D. Cal. Apr. 23, 2009) (reinstatement of employment, front pay, and back pay may be appropriate relief under section 502(a)(3) where employer has violated section 510) (citing 29 U.S.C. § 1140; *Schwartz v. Gregori*, 45 F.3d 1017, 1023 (6th Cir.1995); *Felton v. Unisource Corp.*, 940 F.2d 503, 512 (9th Cir. 1991)); *LEWIS ET AL.*, *supra* note 51, § 15.IX.G.3 (“Some courts have held that back pay and other monetary compensation are not equitable remedies available for violations of Section 510 . . . However, other courts have simply held that back pay (and front pay) are available remedies for Section 510 violations.”).

145. *LEWIS ET AL.*, *supra* note 51, § 15.IX.G.3; *see also Zimmerman v. Sloss Equip., Inc.*, 72 F.3d 822, 827-29 (10th Cir. 1995) (affirming district court’s ruling that plaintiff could not “recover punitive damages or compensatory damages for emotional distress” for violation of section 510).

## ACA

In May 2015, Maria De Lourdes Parra Marin filed a class action complaint<sup>146</sup> in what appears to be the first section 510 lawsuit challenging hours reductions in avoidance of the ACA's employer mandate.<sup>147</sup> In February 2016, U.S. District Court Judge Alvin K. Hellerstein denied the defendant's motion to dismiss.<sup>148</sup> The case is currently in discovery, and the class certification briefing is set to occur between February 2017 and April 2017, followed by dispositive motions.<sup>149</sup> A discussion of *Marin* helps set up the broader reflections in Part 0 regarding the viability of section 510 suits to challenge workforce restructuring (especially hours cuts) in avoidance of the ACA's employer mandate.

## A. Complaint

This subsection describes the facts as pleaded in the complaint.<sup>150</sup> The plaintiff filed her class action complaint against Dave & Buster's Inc. and Dave & Buster's Entertainment (collectively, "Dave & Buster's")<sup>151</sup> on behalf of a class of approximately ten thousand hourly employees in seventy-two stores across the United States.<sup>152</sup> The proposed class consisted of current and former employees who were participants in Dave & Buster's ERISA health insurance plan and whose hours were involuntarily reduced from June 1, 2013 to the present, resulting in either the loss of insurance coverage under the plan or the receipt of inferior health insurance.<sup>153</sup> Between approximately 2006 and May 2013, the plaintiff worked approximately thirty to forty-five hours per week at the Dave & Buster's Times Square Store in New York

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146. Complaint, *Marin v. Dave & Buster's Inc.*, No. 15-Civ.-3608 (AKH) (S.D.N.Y. May 5, 2015), ECF No. 2.

147. See Yesenia Garcia Perez, *ACA Suit Challenging Reduction in Hours Allowed to Proceed*, FOLEY & LARDNER LLP – LABOR & EMPLOYMENT LAW PERSPECTIVES (Mar. 7, 2016), <https://www.laboremploymentperspectives.com/2016/03/07/3493/> (calling *Marin* "the first case of its kind"); Joseph J. Lazzarotti, *Reducing Employee Hours to Avoid ACA Obligations to Offer Coverage Violates ERISA § 510, Class Action Suit Alleges*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (July 28, 2015), <https://www.shrm.org/hrdisciplines/benefits/articles/pages/erisa-reduced-hours-suit.aspx> ("We believe [*Marin*] is the first case in which a court will address this issue . . .").

148. *Marin v. Dave & Buster's, Inc.*, No. 15-Civ.-3608 (AKH), 2016 WL 526542, at \*3 (S.D.N.Y. Feb. 9, 2016).

149. Civil Case Management Plan at 4 (Attachment A), *Marin v. Dave & Buster's, Inc.*, No. 15-Civ.-3608 (AKH) (S.D.N.Y. Mar. 25, 2016), ECF No. 37.

150. Many of these facts are also summarized in the court opinion. See *Marin*, 2016 WL 526542, at \*1-2.

151. Complaint ¶¶ 5-6, *Marin*, No. 15-Civ.-3608 (AKH).

152. *Id.* ¶ 8.

153. See *id.* ¶ 7.

City.<sup>154</sup> As a full-time employee, she was a participant in and received health coverage from the Dave & Buster's Plan.<sup>155</sup>

In 2013, Dave & Buster's designed and implemented a nationwide initiative to "'right size'<sup>156</sup> the number of full-time and part-time employees" in avoidance of providing medical insurance in compliance with the ACA's employer mandate, which would take effect on January 1, 2015.<sup>157</sup> In June 2013, the Times Square store managers announced that the company would reduce the number of full-time employees at that location from over 100 to approximately forty to avoid paying approximately \$2 million dollars in ACA compliance costs.<sup>158</sup> Dave & Buster's subsequently cut the plaintiff's hours to approximately ten to twenty-five hours per week, greatly reducing her weekly pay.<sup>159</sup> In March 2014, Dave & Buster's terminated her health insurance on grounds that she was no longer classified as a full-time employee because she worked on average less than twenty-eight hours per week.<sup>160</sup> As of the complaint's filing, the plaintiff remained unable to participate in the Dave & Buster's health insurance plan due to her part-time status.<sup>161</sup>

The complaint set forth a variety of evidence to support the plaintiff's argument that Dave & Buster's cut employee hours to avoid compliance costs associated with the ACA's employer mandate,<sup>162</sup> nearly all of which was noted in Judge Hellerstein's opinion and is discussed in more detail below.<sup>163</sup> The complaint alleged that the company's conversion of the plaintiff and class members from full-time to part-time status interfered with their rights to participate in the plan, thereby violating section 510, and depriving them of lost wages and benefits.<sup>164</sup> The prayer for relief sought (A) reinstatement to full-time status to restore participation in the plan; (B) equitable restitution of lost wages and benefits, with interest; (C) equitable restitution for the cost of replacement health insurance and any out-of-pocket medical expenses that

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154. *Id.* ¶ 19.

155. *Id.* ¶ 20.

156. "Rightsizing" is the corporate process of "reorganizing or restructuring . . . [a] business by cost-cutting, reduction of workforce, or reorganizing upper-level management." *Rightsizing*, BUSINESS DICTIONARY.COM, <http://www.businessdictionary.com/definition/rightsizing.html#ixzz3chULLLmA> (last visited May 23, 2016).

157. Complaint ¶¶ 22-24, *Marin*, No. 15-Civ.-3608 (AKH).

158. *Id.* ¶¶ 21, 26.

159. *Id.* ¶¶ 29, 31-33.

160. *Id.* ¶¶ 34-36.

161. *Id.* ¶ 42.

162. *See id.* ¶¶ 26-28 (store manager statements at store meetings in Times Square location and nationally); *id.* ¶ 30 (Senior VP statement to press); *id.* ¶ 37 (letter of Senior VP/General Counsel/Secretary to plaintiff's attorney); *id.* ¶ 39 (SEC filings); *id.* ¶¶ 40-41 (IRS filings).

163. *See infra* Part B.

164. Complaint ¶¶ 48-50, *Marin*, No. 15-Civ.-3608 (AKH).

would have been covered under the plan; (D) reasonable attorney's fees and costs; and (E) other relief as deemed just and proper.<sup>165</sup>

### *B. Motion-to-Dismiss Briefing*

The parties filed over seventy pages of briefs regarding the defendant's motion to dismiss, which is impossible to discuss thoroughly within the limited confines of this Article. Instead, this subsection merely traces the main arguments of the parties, which serves to contextualize the rather short opinion published by the court, and foreshadows certain issues that might continue being litigated as the case progresses.

Dave & Buster's motion to dismiss argued that the plaintiff failed to show (1) that the company acted with specific intent to interfere with existing benefits, and (2) that the adverse action (reduction in hours) was actually discriminatory in the sense of being "targeted" at specific employees based upon some ERISA-related characteristic.<sup>166</sup> Regarding the first argument, Dave & Buster's stated that there is no right to ACA-compliant medical insurance under either ERISA (which makes the offering of employee benefits voluntary) or the ACA (under which the employer may simply elect to pay the excise tax instead).<sup>167</sup> In addition, there could be no violation under an ACA-compliant plan that did not exist at the time of the challenged reduction because section 510 gives employees no right to benefits yet to be created.<sup>168</sup> Moreover, the plaintiff only pled that the company restructured its workforce to avoid anticipated and speculative costs of providing ACA-compliant health insurance, which does not demonstrate specific intent to interfere with then-existing benefits.<sup>169</sup> Regarding the second argument, Dave & Buster's contended that the complaint was silent as to the company's reason for selecting employees for the hours cuts, so failed to meet the "targeting" requirement,<sup>170</sup> as reputedly required by the D.C. Circuit's opinion in *Andes v. Ford Motor Co.*<sup>171</sup>

The plaintiff's opposition brief made four main arguments: (1) the complaint pled facts supporting the argument that the defendants reduced her hours so that she would not qualify for her existing health insurance benefit; (2) defendants wrongly conflated consequential loss of benefits resulting from an adverse employment action (e.g., termination) with cutting hours for the specific purpose of causing employees to lose benefits; (3) defendants' argument that plaintiff failed to state a claim because there is no right to

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165. *Id.* at 11.

166. Defendants' Motion to Dismiss at 1-2, *Marin v. Dave & Buster's Inc.*, No. 15-Civ.-3608 (AKH) (S.D.N.Y. July 31, 2015), ECF No. 17.

167. *Id.* at 3-4.

168. *Id.* at 4.

169. *Id.* at 4.

170. *Id.* at 4-5.

171. *Id.* at 18-23 (citing *Andes v. Ford Motor Co.*, 70 F.3d 1332 (D.C. Cir. 1995)).

ACA-compliant health insurance was a red herring because the ACA was simply the underlying reason why defendants chose to interfere with plaintiff's existing benefits; and (4) section 510 did not require her and other class members to show a benefits-related characteristic differentiating them from employees whose hours were not cut, and such a "targeting" requirement would render section 510 meaningless because employers would be free to interfere with the current benefits of employees so long as some other similarly situated employees were not subject to the adverse action.<sup>172</sup>

### C. Court Opinion

Judge Hellerstein denied the defendants' motion to dismiss.<sup>173</sup> In so doing, he described the issue as "whether Plaintiff has alleged a legally sufficient claim for relief that Defendants' curtailment of her hours discriminated against her 'for the purpose of interfering with the attainment' of a right to which Plaintiff 'may become entitled' under the employee benefit plan of which she was a participant."<sup>174</sup>

Judge Hellerstein read the complaint as asserting that Dave & Buster's "intentionally interfered" with the plaintiff's healthcare benefits in avoidance of future healthcare costs associated with the plan.<sup>175</sup> The court found that the complaint stated the following facts supporting the allegation that defendants acted with specific intent: (1) two meetings at the Times Square location where managers declared that the company was cutting that location's full-time staff from 100 to forty to avoid paying \$2 million in anticipated ACA-related costs; (2) similar meetings held at other locations as part of the company's nationwide effort to reduce staff; (3) employee posting on the company's Facebook page describing similar store meetings announcing cuts to hours and health insurance "due to Obamacare"; (4) senior executive's statement to the press that the company's workforce reductions were in response to "upcoming changes associated with health care reform"; and (5) company's SEC filing complaining that its expenses would increase due to complying with the ACA's health insurance requirements or paying penalties for failing to do so.<sup>176</sup> Judge Hellerstein concluded that by cutting the

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172. Plaintiff's Opposition to Motion to Dismiss at 1-2, *Marin v. Dave & Buster's Inc.*, No. 15-Civ.-3608 (AKH) (S.D.N.Y. Sept. 30, 2015), ECF No. 19. Dave & Buster's reply brief mostly rehashed the same arguments as the motion to dismiss. Defendants' Reply in Support of Motion to Dismiss at 1-4, *Marin v. Dave & Buster's, Inc.*, No. 15-Civ.-3608 (AKH), (S.D.N.Y. Nov. 13, 2015), ECF No. 23. In addition, the company characterized the plaintiff's opposition brief as having conceded that there was no right to ACA-compliant benefits, and therefore as having changed course to instead argue that the company reduced her hours in 2013 to interfere with her then-existing health insurance benefits. *Id.* at 2. The problem with doing so, argued defendants, was that the complaint advanced no factual allegations to support this novel argument in the opposition brief. *Id.* at 3.

173. *Marin v. Dave & Buster's, Inc.*, No. 15-Civ.-3608 (AKH), 2016 WL 526542, at \*3 (S.D.N.Y. Feb. 9, 2016).

174. *Id.* at \*1.

175. *Id.*

176. *Id.* at \*1-2.

plaintiff's hours, the defendant "affected her employment status, her pay, and the benefits she had and to which she would be entitled."<sup>177</sup>

The court then addressed the defendants' arguments. While defendants contended both that the plaintiff failed to state a claim because employees are not entitled to "benefits not yet accrued" and that the plaintiff complained only of losing the opportunity to obtain *future* benefits, Judge Hellerstein rejected these arguments.<sup>178</sup> He observed that the plaintiff had also argued that the "Defendants' discrimination affected her *current* benefits."<sup>179</sup> Moreover, plaintiff "sufficiently and plausibly alleged" that the defendants acted with specific intent to interfere with her benefits.<sup>180</sup> In so holding, the court relied on Seventh Circuit precedent finding that an employer violated section 510 by firing an employee to purposefully bar his "continued participation in a company-provided group health plan."<sup>181</sup>

Accordingly, the court held that the complaint constituted a "plausible and legally sufficient claim for relief, including, at this stage, Plaintiff's claim for lost wages and salary incidental to the reinstatement of benefits."<sup>182</sup> Judge Hellerstein recognized the "prevailing opinion" that benefits reinstatement, even where requiring the payment of money, qualifies as equitable relief.<sup>183</sup> Finally, he obliquely rejected defendants' other arguments as premature: "Defendants' citations to summary judgment opinions are not relevant in this early stage of the case."<sup>184</sup>

#### D. Commentary Regarding the Court's Opinion

In response to Judge Hellerstein's order, defense attorneys have urged employers to be cautious about implementing staffing changes in response to the ACA's shared responsibility requirements.<sup>185</sup> Although the motion to dismiss ruling does not speak to whether the plaintiff's claims would ultimately prevail at trial,<sup>186</sup> employers who engage in similar workforce

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177. *Id.* at \*2.

178. *Id.*

179. *Id.* (emphasis added).

180. *Id.*

181. *Id.* (quoting *Gandelman v. Aetna Ambulance Serv., Inc.*, 48 F. Supp. 2d 169, 172 (D. Conn. 1999) (quoting *Kross v. Western Elec. Co.*, 701 F.2d 1238, 1243 (7th Cir.1983))).

182. *Id.*

183. *Id.* (quoting *Harris v. Finch, Pruyn & Co.*, 2008 WL 4155638, at \*6 (N.D.N.Y. Aug. 26, 2008)).

184. *Id.*

185. See Wilber H. Boies & Susan M. Nash, 'Right Sizing' Full-Time Employees to Reduce ACA Obligations May Lead to ERISA Class Action Exposure, MCDERMOTT WILL & EMERY (Feb. 16, 2016), <http://tinyurl.com/hkf3e6o>; Garcia Perez, *supra* note 147; Hrish Shah, *Important Development in Dave & Buster's Lawsuit Regarding Whether Cutting Employee Work Hours Violates ERISA*, FRANZCEK RADELET PC (Feb. 22, 2016), [http://www.franczek.com/frontcenter-Dave\\_and\\_Busters\\_Lawsuit.html](http://www.franczek.com/frontcenter-Dave_and_Busters_Lawsuit.html); Christian Schappel, *ACA ruling: You can now get sued for reducing employees' hours*, HRMORNING (Feb. 24, 2016), <http://www.hrmorning.com/aca-ruling-you-can-get-sued-reducing-employee-hours/>; Sulzer, *supra* note 76.

186. See Garcia Perez, *supra* note 147.

restructuring as Dave & Buster's may, at the very least, risk an expensive defense bill or a costly settlement.<sup>187</sup> Moreover, in a case like *Marin*, overcoming the motion to dismiss opens the door to discovery, potentially forcing defendants to disclose internal discussions showing that the staffing changes were motivated by the desire to avoid ACA health insurance requirements.<sup>188</sup> Schappel argues that, effectively, the ruling limits employer options when choosing an ACA compliance strategy, since cutting the number of employees or the hours worked by employees with the purpose of skirting ACA requirements now appears quite risky.<sup>189</sup>

Sulzer has written a relatively extensive analysis of the court opinion and the road ahead in *Marin*, which he believes will include substantial challenges for the effected workers.<sup>190</sup> Having overcome the motion to dismiss, the plaintiff and class members now face the challenge of actually proving that the company “harbored the specific intent to interfere with their right to health benefits. Such claims are among the most difficult ERISA allegations to establish.”<sup>191</sup> That said, the plaintiff may be able to prove specific intent with direct evidence—specifically, the multiple public statements made by the company, as well as any damning internal documents that are produced in discovery.<sup>192</sup>

But if the plaintiff cannot establish her case with direct evidence, then the burden-shifting framework for circumstantial evidence will apply.<sup>193</sup> In Sulzer's opinion, the plaintiff can likely establish the prima facie case of interference with benefits on the basis of the company's statements, particularly if the plaintiff is able to produce evidence that the company “was not experiencing other financial pressures (including from stockholders), was not implementing general cost savings measures beyond health care, and was not considering reducing its full-time workforce to manage health costs before the enactment of the ACA.”<sup>194</sup> If the plaintiff establishes her prima facie case, then Dave & Buster's “could plausibly argue that the substantial costs of complying with the ACA in an already challenging economic environment warranted its actions.”<sup>195</sup> Then the plaintiff would need to show that this legitimate business reason, cutting costs, was actually pretextual, which would require showing a “discriminatory motive.”<sup>196</sup> In Sulzer's view, pretext is “easier to prove when an employer's action is undertaken on a small scale,” but harder to prove in the case of “a nationwide reduction in hours,

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187. See Schappel, *supra* note 185.

188. See Boies & Nash, *supra* note 185.

189. Schappel, *supra* note 185.

190. See Sulzer, *supra* note 76.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

uniformly and consistently imposed, and implemented in order to reduce quantifiable and measurable costs.”<sup>197</sup> In the latter circumstance, Sulzer believes, courts are likely to defer to the company’s view of reasonable cost considerations.<sup>198</sup> Moreover, even Dave & Buster’s strident opposition to the ACA “does not deprive it of the right to make fundamental business decisions that are uniformly imposed across its workforce.”<sup>199</sup> In Sulzer’s view, the plaintiffs would be unlikely to prove pretext because Dave & Buster’s “did not appear to target individual employees with high health care costs or use other impermissible criteria . . . in implementing its policy.”<sup>200</sup>

## V.

### REFLECTIONS ON ERISA § 510 AND WORKFORCE RESTRUCTURING

What do the doctrinal issues discussed in Part 0 and the groundbreaking *Marin* lawsuit presented in Part 0 reveal about the viability of section 510 cases to challenge employer workforce restructuring in avoidance of compliance costs relating to the ACA’s employer mandate? Admittedly, the legal landscape is only just beginning to take shape in this area,<sup>201</sup> so predictions are likely to be proven wrong. Nonetheless, this final Part lays out tentative reflections on what to expect from this “[n]ext [g]eneration of ERISA [b]enefits [l]itigation.”<sup>202</sup> First, standing issues will limit viable cases to a pretty narrow range of factual circumstances: viable plaintiffs will be, prior to the adverse action, full-time employees for an employer with an existing health plan. Such plaintiffs will most likely challenge hours, as is the case in *Marin*, but could potentially also challenge terminations or reclassifications as independent contractors. In addition, specific intent will be the central issue in these cases. In some cases, specific intent may be proved with direct evidence, but usually, the burden-shifting framework for circumstantial evidence will apply. In the latter cases, plaintiffs will often face substantial challenges in proving that the employer’s general cost-cutting justification for the hours cut was actual pretextual, and that the employer instead intended to interfere with existing health insurance benefits. The “targeting” argument raised in *Marin*, however, is unlikely to pose a serious obstacle to plaintiffs. Finally, prevailing plaintiffs will be able to avail

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197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. See Garcia Perez, *supra* note 147.

202. See James P. Baker & Emily Garcia-Yow, *Yikes! It’s Alive! The Affordable Care Act and the Next Generation of ERISA Benefits Litigation*, EMP. BENEFITS L.J., Summer 2014, at 1.

themselves of some meaningful remedies, including injunctive relief, equitable restitution, and possibly surcharge, despite some other remedies being off the table.

### A. Standing

Due to standing issues, potentially viable section 510 claims against ACA-motivated workforce restructuring are limited to a pretty narrow range of factual circumstances. Since most plans limit participation to full-time employees (usually defined as working thirty hours per week or more),<sup>203</sup> part-time employees do not have standing to sue under section 510 because they neither are eligible nor will they become eligible for benefits.<sup>204</sup> They will not become eligible because, as part-time employees, they lack a “colorable claim” that they will fulfill eligibility requirements in the future.<sup>205</sup> Therefore, an employer apparently can assign overtime to full-time employees instead of increasing the hours of part-time employees without risk of violating section 510.<sup>206</sup> Similarly, there would also be a standing problem in a section 510 case against an employer without a health plan who has cut employees’ hours to avoid having to provide health insurance or pay the excise tax. Where there is no plan, the employer cannot be interfering with any existing benefit, and the employees will not be able to demonstrate a “colorable claim” that they will become eligible in the future<sup>207</sup> because the employer can simply choose to pay the applicable penalty under I.R.C. § 4980H instead.<sup>208</sup>

Thus, viable plaintiffs in section 510 suits challenging workforce restructuring typically will be, prior to the adverse action, full-time employees for an employer with an existing health plan. The most discussed workforce restructuring scenario is an employer with a plan cutting the hours of full-time employees to avoid employer mandate compliance costs,<sup>209</sup> just like *Marin*,<sup>210</sup> so the remainder of the reflections will focus on that scenario. However, one could also imagine viable suits with analogous facts to *Marin*, except with a different adverse action—such as the termination of workers or the attempt to reclassify them as independent contractors. Overall, section

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203. See James M. Nelson, *The Patient Protection and Affordable Care Act, ERISA § 510 and the Next Generation of Benefits Litigation Concerns*, ABA EMP. BENEFITS COMMITTEE NEWSLETTER, Spring 2013, [http://www.americanbar.org/content/newsletter/groups/labor\\_law/ebc\\_newsletter/13\\_spr\\_ebcnews/ppaca.html](http://www.americanbar.org/content/newsletter/groups/labor_law/ebc_newsletter/13_spr_ebcnews/ppaca.html).

204. See 29 U.S.C. § 1002(7) (2012).

205. See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117-18 (1989).

206. Nelson, *supra* note 203.

207. See *Firestone*, 489 U.S. at 117-18.

208. Moore, *supra* note 12, at 613, 627.

209. See *supra* Part 0.

210. See Complaint ¶¶ 5-6, *Marin v. Dave & Buster’s, Inc.*, No. 15-Civ.-3608 (AKH) (S.D.N.Y. May 8, 2015), ECF No. 2.

510 suits involving full-time employees who are participants in the employer health plan prior to the hours reduction seem likely to clear standing hurdles because the adverse actions will be considered to impact existing benefits under the plan.<sup>211</sup>

### B. *Specific Intent*

Proving specific intent is likely to be the central issue in section 510 cases challenging ACA-motivated hours cuts.<sup>212</sup> Plaintiffs in these suits will be best off if they can prove specific intent with direct evidence. For example, in *Marin*, the plaintiff may be able to do so given the extensive statements made by the company regarding its motives for slashing the hours of full-time employees.<sup>213</sup> But employers seem unlikely to continue to make such brazen public statements about their motives in slashing employee hours. Indeed, the defense bar is advising employers to centralize any communications about workforce restructuring and abstain from making “smoking gun” statements.<sup>214</sup> Particularly in states where the statute of limitations is short for section 510 claims,<sup>215</sup> the window for proving these sorts of section 510 claims with direct evidence may be closing rapidly. That is, as defense attorneys raise awareness among employers about this litigation risk, employers will be progressively less likely to make loose statements that allow employees to storm the castle through the direct-evidence gate.

Accordingly, plaintiffs in section 510 suits regarding ACA-motivated cuts in hours are likely to contend with the burden-shifting framework. Plaintiffs can probably meet the prima facie case with analogous facts to *Marin*, and perhaps even with somewhat weaker facts, as “[t]he prima facie burden is not intended to be prohibitive.”<sup>216</sup> Since the defendant then faces only the burden of production (not persuasion) when proffering the LNDR,<sup>217</sup> and since cost savings is an LNDR,<sup>218</sup> these cases will very likely be decided at the pretext phase of burden shifting. Such cases will turn upon whether there is circumstantial evidence that the hours cut was specifically intended to interfere with benefits (e.g., company spreadsheet and statement regarding employee benefits costs in *Pennington v. West Atlas, Inc.*<sup>219</sup>) or instead was

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211. See *Marin v. Dave & Buster’s, Inc.*, No. 15-Civ.-3608 (AKH), 2016 WL 526542, at \*2. (S.D.N.Y. Feb. 9, 2016).

212. E.g., Solander, *Trying to Avoid the ACA Mandate?*, *supra* note 39 (“The critical issue in ERISA 510 cases is often whether the employer acted with a specific intent to interfere with an employee’s rights to benefits under a plan.”).

213. See Sulzer, *supra* note 76.

214. E.g., Solander, *Trying to Avoid the ACA Mandate?*, *supra* note 39.

215. See *supra* Part F (limitations periods as short as one year).

216. See Sulzer, *supra* note 76.

217. See *Dister v. Cont’l Grp., Inc.*, 859 F.2d 1108, 1112 (2d Cir. 1988).

218. See *Apsley v. Boeing Co.*, 691 F.3d 1184, 1209 (10th Cir. 2012); *Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 239 (4th Cir. 1991).

219. See 202 F.3d 902, 908-09 (6th Cir. 2000); see also *supra* Part E (discussing *Pennington*).

motivated by general costs savings (e.g., no indication company studied benefits costs before deciding to take adverse action in *Apsley v. Boeing Co.*<sup>220</sup>). Evidence that the employer cut hours to lower labor costs in general, even if so doing produced “incidental” savings in employee health insurance costs, will not be sufficient to prove pretext.<sup>221</sup> Indeed, even in a section 510 case like *Marin*, with strong evidence of specific intent, there is no guarantee that the plaintiff will be able to show that an LNDR of general cost savings is pretextual.<sup>222</sup>

Finally, while the “targeting” argument<sup>223</sup> is yet to be addressed by the court in *Marin*,<sup>224</sup> it seems unlikely to gain traction in that case or future cases involving ACA-motivated cuts in hours. As noted above,<sup>225</sup> the argument is based upon the D.C. Circuit’s opinion in *Andes v. Ford Motor Co.*,<sup>226</sup> which is notable for its narrow factual scope and poor reasoning. In *Andes*, the D.C. Circuit held that Ford’s sale of a subsidiary, which resulted in the loss of early retirement benefits for subsidiary employees, did not violate section 510 because there was no contention that the company had treated the affected employees discriminatorily vis-a-vis other employees, or that some ERISA-related characteristic special to the subsidiary was essential to its selection for sale.<sup>227</sup> Based on a small number of other circuit court decisions that overall granted summary judgment for defendants more often when the cases involved organizational changes, the court discerned a “pattern” that “implicitly recognized that a corporate organizational change that results in the termination of employees is really not a prototype of the sort of action that § 510 was primarily designed to cover.”<sup>228</sup> In an unconvincing application of the principle of *noscitur a sociis*, the court argued that “fine, suspend, expel, discipline, or discriminate” all were actions that “typically . . . targeted at an individual employee,” so “discharge,” placed alongside them in section 510, should be given this same individualized meaning.<sup>229</sup> The court argued that Congress would have used “layoff” or “termination” if it had intended section 510 to reach anything other than such personalized firings.<sup>230</sup> The court also pointed to legislative history stating that section 510 was meant to prevent “discharge, or other discriminatory conduct,” and

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220. See *Apsley*, 691 F.3d at 1208-09.

221. See *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1492 (11th Cir. 1993); *Millsap v. McDonnell Douglas Corp.*, 162 F. Supp. 2d 1262, 1299 (N.D. Okla. 2001).

222. See *Sulzer*, *supra* note 76; see also *supra* Part D (summarizing *Sulzer*’s argument).

223. See *supra* Part B (summarizing “targeting” argument).

224. See *Marin v. Dave & Buster’s, Inc.*, No. 15-Civ.-3608 (AKH), 2016 WL 526542, at \*2 (S.D.N.Y. Feb. 9, 2016) (refusing to consider opinions about summary judgment, like *Andes v. Ford Motor Co.*, at the motion to dismiss phase).

225. See *supra* Part B.

226. 70 F.3d 1332 (D.C. Cir. 1995).

227. *Id.* at 1336-39.

228. *Id.* at 1337 (emphasis added).

229. *Id.*

230. *Id.*

thereby declared that “[t]he obvious implication is that ‘discharge’ should be construed as referring to discriminatory, viz targeted, actions.”<sup>231</sup>

However, these arguments that “discharge” can only refer to individualized firings are unconvincing. Both the *noscitur a sociis* and legislative history arguments depend on the unsupported idea that “discrimination” (and therefore “discharge”) intrinsically cannot reach broad organizational decisions, which is not supported by the dictionary<sup>232</sup> or history,<sup>233</sup> and clashes with Title VII doctrine, such as disparate impact.<sup>234</sup> Moreover, the D.C. Circuit itself has used “discharged” when referring to large groups of employees.<sup>235</sup> Regardless of its merit, a case based upon parsing the meaning of “discharge” should not be analogized to the distinct situation of an hours cut.<sup>236</sup> Finally, as argued by the plaintiffs in *Marin*,

If alleging targeting based upon a benefits-specific characteristic unique to the plaintiff (and putative class) were required in order to state an ERISA § 510 claim, any employer could avoid liability by interfering with the benefits of a significant number of employees by taking employment action against them, so long as it refrained from taking the same action against at least some other similarly situated employees with that same benefits-related characteristic.<sup>237</sup>

Given that neither the text nor the legislative history of section 510 is anywhere near explicit about a “targeting” requirement, courts should not assume that Congress intended for employers to so easily render meaningless the protections of section 510. In summary, due to the relatively narrow factual circumstances and the poor reasoning of *Andes*, the opinion seems unlikely to have a large impact on the specific intent analysis of section 510 cases challenging ACA-motivated hours cuts.

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231. *Id.* at 1338 (emphasis in original).

232. *Cf. Discrimination*, OXFORD ENGLISH DICTIONARY ON-LINE, <http://www.oed.com/view/Entry/54060?redirectedFrom=discrimination#eid> (last visited May 25, 2016) (defining “discrimination” as the “[u]njust or prejudicial treatment of a person *or group* . . .”) (emphasis added).

233. *Cf. The Civil Rights Movement 1968-2008*, NAT’L HUMANITIES CTR., <http://nationalhumanitiescenter.org/tserve/freedom/1917beyond/essays/crm2008.htm> (last visited May 25, 2016) (“Two and a half centuries of slavery and another hundred years of pervasive discrimination had left deep imprints on all American institutions. Every industry that employed African Americans had developed its own variant of entrenched occupational segregation.”).

234. *See generally*, 1 EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 2:30 (Westlaw, database updated Dec. 2015) (discussing disparate impact claims, which challenge “employment policies or practices”).

235. *E.g.*, *Victor Prods. Corp. v. N.L.R.B.*, 208 F.2d 834, 836 (D.C. Cir. 1953) (using “discharged” with reference to group of thirty-three employees).

236. *See* Plaintiff’s Opposition to Motion to Dismiss at 23, *Marin v. Dave & Buster’s Inc.*, No. 15-Civ.-3608 (AKH) (S.D.N.Y. Sept. 30, 2015), ECF No. 19.

237. *Id.* at 23.

### C. Remedies

Section 502(a)(3) is likely to provide meaningful remedies to plaintiffs who prevail in section 510 cases challenging ACA-motivated hours cuts. First, based upon the text of section 502(a)(3) and U.S. Supreme Court precedent, prevailing plaintiffs in these cases will be awarded injunctive relief.<sup>238</sup> Specifically, retroactive reinstatement of health insurance would be appropriate under section 502(a)(3).<sup>239</sup> Indeed, even retroactive reinstatement of health insurance might be appropriate, based on the argument that it would reverse the “unlawful gain” reaped by the employer through violation of section 510, even if the practical effect would be to reimburse the prevailing plaintiffs for past losses.<sup>240</sup> At the very least, the prevailing plaintiffs could enjoy this injunctive remedy prospectively. That said, prevailing plaintiffs probably could not characterize the award of back pay to reimburse them for the unlawful salary cut as injunctive relief. This would likely be considered “an ‘injunction’ to pay damages”—merely a legal remedy in equitable clothing.<sup>241</sup> In addition, the court might reject the argument that this back pay was “incidental” to the claim for reinstatement of health insurance, particularly if the amount of back pay requested was large.<sup>242</sup>

Second, equitable restitution will be available to prevailing plaintiffs in these cases.<sup>243</sup> Of course, equitable restitution will only be awarded to recover funds in the defendant’s possession.<sup>244</sup> Therefore, the award of equitable restitution of health benefits and lost wages, as requested in *Marin*,<sup>245</sup> would seem appropriate because the unlawfully accrued funds went to the defendant.<sup>246</sup> Admittedly, the lost wages would effectively be back pay, an issue about which the Tenth Circuit and Sixth Circuit have split in section 510 cases.<sup>247</sup> But, even though *Sereboff v. Mid-Atlantic Medical Services, Inc.* was not a section 510 case, the Supreme Court’s reasoning (focusing the inquiry for restitution on whether the funds are in the defendant’s possession),<sup>248</sup> supports the Sixth Circuit’s view that back pay may be awarded as restitution in a section 510 case. That said, equitable restitution could not award funds paid by prevailing plaintiffs to a third party—such

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238. See *supra* Part 6.

239. See *id.* (discussing *Phelan v. Wyo. Associated Builders*, 574 F.3d 1250 (10th Cir. 2009)).

240. See *id.* (discussing *Phelan*, 574 F.3d at 1255).

241. See *Phelan*, 574 F.3d at 1254.

242. See *supra* Part 6 (discussing *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246 (10th Cir. 2004)).

243. See *supra* Part 5.

244. See *id.* (citing *Sereboff v. Mid Atlantic Med. Servs.*, 547 U.S. 356, 362-63 (2006)).

245. See Complaint at 11, *Marin v. Dave & Buster’s, Inc.*, No. 15-Civ.-3608 (AKH) (S.D.N.Y. May 8, 2015), ECF No. 2.

246. See *supra* Part 5 (citing *Sereboff*, 547 U.S. at 362-63).

247. See *supra* Part 5 (discussing *Schwartz v. Gregori*, 45 F.3d 1017, 1022-23 (6th Cir. 1995); *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246, 1255 n.9 (10th Cir. 2004)).

248. See *id.* (citing *Sereboff*, 547 U.S. at 362-63).

costs for replacement health insurance or out-of-pocket medical expenses that would have been covered under the plan—as those funds would not be in the defendant’s possession.<sup>249</sup>

Whether the surcharge remedy will be available is unclear. As previously discussed, the remedy appears limited to circumstances where the defendant, acting as a fiduciary, breaches its fiduciary duty.<sup>250</sup> Accordingly, the defendant could argue that it was wearing its employer “hat” when it chose to cut employee hours, and therefore was not acting as a fiduciary.<sup>251</sup> But the plaintiff could counter that the hours cut was intended to interfere with employee benefits, hence the defendant was actually wearing its “plan administrator” hat and therefore was acting as a fiduciary.<sup>252</sup> Surcharge is relevant to prevailing plaintiffs because, if available, the remedy would allow them to recover funds that cannot be recovered as restitution because they are not in the defendant’s possession, such as money paid to a third-party for replacement health insurance or previously covered medical expenses.

Finally, there are certain remedies that will not be available in litigation regarding hours cuts made by employers with health insurance plans to avoid compliance costs under the ACA’s employer mandate. Reformation of contract will not apply in such cases because the reduction in hours cannot be fairly characterized as mistake or fraud.<sup>253</sup> For example, the defendant in *Marin* apparently communicated the hours cuts truthfully and accurately.<sup>254</sup> Similarly, equitable estoppel will not apply because the defendant probably will not have made untrue representations regarding the plan for the court to enforce as if they were true.<sup>255</sup> Lastly, prevailing plaintiffs will not be able to recover emotional distress or punitive damages.<sup>256</sup>

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249. See *supra* Part 5. (citing *Sereboff*, 547 U.S. at 362-63). Therefore, the plaintiff and class members in *Marin* will not be able to recover “equitable restitution to make them whole for the costs of health insurance they secured to replace the health insurance Dave & Buster’s denied them and to reimburse them for any out of pocket costs for medical claims” that would have been paid by the defendant’s plan—as they requested in the Prayer for Relief. See Complaint at 11, *Marin*, No. 15-Civ.-3608 (AKH).

250. See *supra* Part 4 (discussing surcharge remedy in *Cigna Corp v. Amara* and follow-on circuit court opinions).

251. See LEWIS ET AL., *supra* note 51, § 10.II.C.1 (“[A] plan sponsor can wear ‘two hats’ with respect to a plan. When an employer engages in settlor functions, it is wearing only its ‘employer’ hat and is not acting as a fiduciary, even if its actions affect the interests of participants and beneficiaries. In contrast, when an employer is wearing its ‘fiduciary’ hat, the employer is bound by the fiduciary obligations imposed by ERISA.”).

252. See *id.*

253. See *CIGNA Corp. v. Amara*, 563 U.S. 421, 440 (2011).

254. See *supra* Part 0.g.a-b (discussing complaint and opinion in *Marin*).

255. See *id.*

256. See *supra* Part 7 (citing LEWIS ET AL., *supra* note 51, § 15.IX.G.3).

## CONCLUSION

This Article has discussed a new frontier of employee benefits litigation relating to the ACA. Under the law, applicable large employers who fail to provide affordable, minimum-level health coverage to their full-time employees must pay a substantial tax. This has created an incentive for certain employers to engage in workforce management techniques, including reducing the hours of full-time employees, to avoid the cost of providing minimum-level health coverage or paying the tax. As the Article has shown, certain employees at the receiving end of such methods—particularly hours cuts—may be able to raise viable claims under section 510 of ERISA, but such plaintiffs will also face a variety of challenges. By assessing the foundational jurisprudence and the first section 510 lawsuit challenging ACA workforce restructuring, this Article has reached several conclusions regarding the viability of such litigation. Most viable plaintiffs, prior to the adverse action, will have worked full-time for an employer with an existing plan. Plaintiffs' biggest hurdle will be proving specific intent to interfere with benefit rights. Plaintiffs who cannot do so with direct evidence may struggle to do so with circumstantial evidence, as this will require demonstrating that the employer's claim to have cut hours in an effort to lower overall labor costs was pretextual. However, if plaintiffs do prevail, they will be able to avail themselves of several meaningful remedies, including injunctive relief, equitable restitution, and possibly surcharge. Of course, the repeal and replacement of the ACA will wash away this new legal landscape just as its contours are coming into focus. But in the meantime, the legal issues discussed in this Article remain of substantial importance for employees impacted by ACA-motivated workforce restructuring, as well as for employers that are considering their ACA compliance strategy.

