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News & Types: Employment, Labor & Benefits Update

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Practices: Employment, Labor & Benefits

Health Care Reform: Reducing Employee Hours to Avoid the ACA is No Game
By Frank Del Barto

On February 9, 2016, the U.S. District Court for the Southern District denied Dave & Busters, Inc.'s ("D&B") motion to dismiss a class action lawsuit brought by a former employee of the D&B store located in Times Square, New York. *Maria De Lourdes Parra Marin v. Dave & Buster's, Inc. et al.*, 15-cv-3608 (S.D.N.Y. Feb. 9, 2016). In the underlying lawsuit, the former employee alleged that D&B violated her rights under Section 510 of ERISA when the company intentionally reduced her working hours to avoid having to offer and provide her and other employees with affordable health insurance coverage as required by the Affordable Care Act ("ACA"). Because D&B's motion to dismiss was denied, this case moves forward to the discovery and, possibly, to trial. This case should be monitored by any employer that reduced hours to avoid the ACA coverage mandate or is considering such an action in the future.

In accordance with the ACA's shared responsibility provisions, employers with at least 50 full-time employees (including full-time-equivalent employees) must either offer minimum essential coverage to their full-time employees (and dependents), or make an employer shared responsibility payment to the IRS. ERISA Section 510 provides, in pertinent part, that "it shall be unlawful for any person to discharge, fine, suspend, expel, discipline or discriminate against a participant . . . for any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan."

In the D&B case, the plaintiff alleged that, from 2006 to 2013, she worked full-time for D&B and received health insurance under D&B's health plan. However, in June 2013 and in response to the ACA coverage requirements, D&B store managers allegedly told employees that the cost of complying with the ACA would be about $2 million and that the full-time employee count would be reduced from 100 full-time employees to 40 full-time employees for the specific purpose of avoiding the cost. After this announcement, the plaintiff's working hours were in fact reduced from 30 - 45 hours per week to 10 - 25 hours per week, which caused her to lose health insurance coverage in March 2014.

In denying D&B's motion to dismiss, the court found that the "critical element is the intent of the employer -- proving that the employer specifically intended to interfere with benefits. . . Discharging an employee for the

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purpose of depriving him of continued participation in a company-provided group health plan is a violation of Section 510."

Citing to the meetings held by managers in D&B's Times Square location about the ACA costing D&B "two million dollars," the resulting reduction of full-time headcount, and to similar meetings held at other D&B locations, the court held that D&B acted with an "unlawful purpose" in taking this adverse action against the plaintiff.

Because this case will now proceed to discovery and possibly to trial, the case provides a reminder to all executives, managers and supervisors about making statements about reducing employee working hours in any context that includes the ACA. We will continue to monitor this case and provide updates as necessary.

2016 DEVELOPMENTS FOR UNEMPLOYMENT BENEFITS IN ILLINOIS
By Jiwon Juliana Yhee

So far, in 2016, there have been two legal developments that significantly affect unemployment benefits in Illinois. The Illinois Unemployment Insurance Act has long established that an individual is ineligible for unemployment benefits if he or she has been discharged for "misconduct" in connection with his or her work. The Act defines "misconduct" as the "deliberate and willful violation of a reasonable rule or policy of the employing unit, governing the individual's behavior in performance of his work, provided such violation has harmed the employing unit or other employees or has been repeated by the individual despite a warning or other explicit instruction from the employing unit."

However, in January 2016, the Act was amended to include eight specific categories of work-related circumstances that, notwithstanding the definition of "misconduct," constitute "misconduct" under the Act. The eight circumstances are: (1) falsification of an employment application, or any other documentation provided to the employer, to obtain employment through subterfuge; (2) failure to maintain licenses, registrations, certifications reasonably required by the employer or required by law for an employee to perform his or her regular job duties; (3) knowing, repeated violations of employer's attendance policies despite receiving a written warning; (4) damaging the employer's property through conduct that is grossly negligent; (5) insubordination; (6) consuming alcohol or illegal or non-prescribed drugs or impairing substances on the employer's premises during work hours in violation of employer's policies; (7) reporting to work under the influence of alcohol, illegal or non-prescribed drugs or impairing substances; and (8) grossly negligent conduct that endangers the safety of the individual or co-workers.

In addition the amendment of the Act, the Illinois Supreme Court, in *Petrovic v. The Department of Employment Security et al.*, examined the judicially created "commonsense" exception to the general rule that "misconduct" requires a violation of an express rule or policy. The "commonsense" exception, which had support in numerous appellate court decisions, stands for the idea that "some acts of misconduct are so serious and so commonly accepted as wrong that employers need not have rules covering them." Where the "commonsense" exception applied, an employer did not have to present evidence of an express rule or policy that had been violated. In *Petrovic*, however, the Illinois Supreme Court rejected the "commonsense" exception except in two narrow situations: where the employee's conduct would be (1) illegal or (2) constitute a *prima*

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facie intentional tort. In short, where an employee's behavior, amongst other things, constitutes a crime, such as theft or assault, or civil rights violations, such as sexual harassment, or a *prima facie* intentional tort, such as battery, "it is fair to say that the employee knows his actions are likely to result in termination," and the employee is disqualified from receiving unemployment benefits due to "misconduct" regardless of whether the employer has an express rule or policy forbidding the employee's conduct. However, where the commonsense exception does not apply, the employer must substantiate the factual allegations in its "protest" with competent evidence in the record showing the existence of a rule or policy that is reasonable and that the employee was made aware of such rule or policy. In *Petrovic*, evidence supporting the employer's factual allegations were not introduced, leading, among other reasons, to the Court's decision that the employee was eligible to receive unemployment benefits.

In light of the amendments to the Illinois Unemployment Insurance Act and *Petrovic*, employers should continue to carefully document each termination and the reasons behind that termination. Additionally, employers who seek to protest a claim for unemployment benefits on the basis of an employee's willful or deliberate violation of an express rule or policy should be prepared to offer evidence substantiating such a violation and the violated rule or policy. Further, employers are advised to review their employee handbooks to make sure that the rules and policies included clearly address behavior for which the employer may want to terminate an employee. While, according to *Petrovic*, a rule or policy need not be written or formalized, formalizing and/or writing down such rules and policies may help employers demonstrate that the violated rules and policies exist and that a terminated employee was aware of those rules and policies. Finally, employers should think about issuing a written warning (including the rule or policy violated) to an employee who has engaged in unwanted conduct instead of immediately terminating that employee. A written warning may help to show that the employee was put on notice of the fact that his or her conduct was unacceptable and also help in showing that the employee's conduct falls under one or more of the circumstances constituting "misconduct" that have been added to the Illinois Unemployment Insurance Act.

401(K) PLAN: CORRECTING FOR PLAN LOAN FAILURES
By Frank Del Barto

Many 401(k) plans permit employees to take plan loans. These loans, which are governed by the Internal Revenue Code ("IRC") must not exceed specific dollar limits, must not provide for level amortizations over a period longer than 5 years (unless the loan is being used to purchase a primary residence), and must require payments at least quarterly. If a loan does not meet these basic requirements, then the loan will be considered a deemed distribution, which becomes reportable to the IRS and taxable to the employee.

Loan failures are very common. In fact, they often result when employers / plan administrators simply fail to start the employee's loan repayments in a timely manner. Depending on whether a plan loan is still within its cure period (end of the calendar quarter following the quarter in which the payment was missed) or outside the cure period, the plan sponsor can either self-correct for the loan failure or file a loan correction submission under the IRS's Voluntary Correction Program ("VCP"). The facts and circumstances of the loan failure and the plan documents will dictate whether self-correction or a VCP submission is required in order to avoid the adverse tax consequences associated with loan failures.

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The good news is that the IRS continues to simplify the VCP correction submission process in order to encourage plan sponsors to voluntarily correct for various plan operational failures, including loan failures. In addition to a streamlined application process, the IRS recently reduced the VCP compliance fees for loan correction submissions and now bases the loan correction compliance fee on the number of plan participants with loan failures that occurred versus the total number of plan participants.

Should you have any questions on 401(k) plan compliance or the correction programs available, please feel free to call. The simplicity of the correction process is not worth the risk of an improper correction or a decision not to properly correct a loan failure.

For more information about this or any other employment law topic, please contact Frank Del Barto, Chair of the Employment, Labor & Benefits Group, at 847.734.8811 or via email at fdelbarto@masudafunai.com.

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