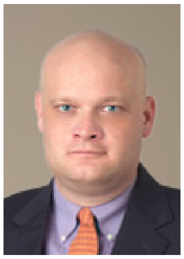

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Understanding ERISA Section 510 Discrimination and Retaliation Claims

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This practice note discusses Section 510 of the Employee Retirement Income Security Act (ERISA), which prohibits interference with benefits, and retaliation for the exercise of rights, under ERISA employee benefit plans. The prohibition applies to employee pension benefit plans and employee welfare benefit plans, to vested and unvested benefits, and to actions affecting a single individual or multiple individuals. By virtue of Section 510, employees should be able to claim benefits without fearing their employer's interference or reprisal.

This practice note covers:

- Competing Principles in ERISA Section 510 Litigation
- Types of Claims under Section 510
- Relation to Other Laws
- Procedural Matters for Bringing Section 510 Claims
- Proving Violations of Section 510
- Remedies
- Section 510 Litigation Relating to the Patient Protection and Affordable Care Act

Competing Principles in ERISA Section 510 Litigation

Section 510 (29 U.S.C. § 1140), prohibits discrimination (including discharge, fine, suspension, expulsion, or discipline) against any ERISA employee benefit plan participant or beneficiary, for exercising any right under the provisions of the plan. Section 510 claims lie at the intersection of many well-established and often competing policies. Since these policies are explicitly and implicitly considered by courts at all stages of litigation, you should recognize them to help litigants to better frame legal arguments.

Factors against the Robust Application of Section 510

Historically, the law has not required employers to sponsor employee benefit plans. If an employer chooses to sponsor a plan, it has broad discretion to establish the plan's terms and only marginally narrower discretion to amend those terms on a prospective basis. This is particularly true of welfare benefits because, at least prior to health care reform and with the exception of certain Internal Revenue Code-based limits, the law did not prescribe levels of participation or benefits.

In addition, ERISA itself is indicative of public policy favoring employer-sponsored plans. Courts are often reluctant to impose costs and expenses that disincentivize employers from sponsoring plans.

The employment-at-will doctrine is also lurking in the background of many Section 510 cases. This doctrine militates against courts second-guessing employment-related decisions. Federal and state comity is also a consideration since employment relationships are traditionally governed by state law.

Finally, courts recognize societal norms allowing companies to operate their businesses efficiently and so as to maximize profits. This factor can be particularly important in the context of adverse employment actions taken during a downturn in a company's economic fortunes.

Factors for the Robust Application of Section 510

ERISA is the law of the land. Its primary purpose is to ensure that employers' benefit-related promises are kept. Despite the free hand that employers have in setting the terms of their plans, Congress clearly intended that employers keep the promises they have made.

Section 510 is an integral component of the statutory scheme enacted to accomplish this goal. Without Section 510, employers could interfere with employees' opportunities to obtain promised benefits through adverse employment actions. That would undermine all of ERISA's participation, vesting and benefit accrual requirements.

Of course, notions of fundamental fairness to employees require that employers' benefits-related promises be kept.

Types of Claims under Section 510

Section 510 (29 U.S.C. § 1140) authorizes:

- Interference claims
- Retaliation claims –and–
- Whistleblower claims

For each type of claim, the alleged unlawful action must be a discharge, fine, suspension, expulsion, discipline, or discrimination. These actions must affect the employment relationship. It is not enough to show that a benefit plan has been changed in a way that disadvantages a participant or merely that a benefit claim was denied.

Interference Claims

Section 510 prohibits adverse employment actions that are taken to interfere with plan participants' and beneficiaries' earned or promised benefits. These are the most common types of claims under Section 510.

While the concept of interference claims can be simply stated, complexities arise from the need to analyze specific adverse employment actions taken in the context of complex, multifaceted employment relationships. Plaintiffs must establish that employers *specifically intended* to interfere with their rights under employee benefit plans or ERISA. In the more common cases that do not involve direct evidence of discrimination, plaintiffs must also establish that their employers' proffered legitimate reasons for having taken adverse employment actions are merely pretexts for unlawful discrimination.

For example, interference claims might arise due to:

- A termination of employment shortly before a participant would become vested or qualified to receive supplemental or early retirement benefits under a pension plan
- A change in employment status (e.g., layoffs, outsourcing positions to a contractor, reclassifying employees as independent contractors or from full-time to part-time) in connection with workforce restructurings or a company's financial distress
- A failure to hire or maintain benefits in connection with a company merger or acquisition –or–
- A misrepresentation about the possibility of an impending early retirement window program to an employee who terminates employment prior to implementation of the program

Retaliation Claims

Section 510 (29 U.S.C. § 1140) prohibits adverse employment actions taken against participants and beneficiaries in retaliation for their exercise of rights under an employee benefit plan or ERISA.

For example, a retaliation claim might arise if an employee's employment is involuntarily terminated after he or she files a claim for reimbursement of substantial medical expenses under a group health plan.

Whistleblower Claims

Section 510 (29 U.S.C. § 1140) prohibits adverse employment actions taken against individuals who have given information, have testified or are about to testify in any inquiry or proceeding related to ERISA.

For example, a whistleblower claim might arise if an employee experiences a change in employment status after raising possible violations of law relating to an ERISA plan.

Section 510 also prohibits discrimination against employers contributing to multiemployer plans for exercising rights under ERISA or giving information or testifying in any inquiry or proceeding before Congress relating to ERISA. This narrow provision was added to Section 510 in 2006. P.L. 109-280, § 205 (Aug. 17, 2006).

Relation to Other Laws

Section 510 claims are frequently brought with other claims under ERISA, federal and state nondiscrimination laws and state employment laws.

Other ERISA Claims

ERISA's civil enforcement provision authorizes certain claims that are often paired with Section 510 claims.

Benefits Claims

Under ERISA Section 502(a)(1)(B) (*29 U.S.C. § 1132(a)(1)(B)*), a participant or beneficiary may bring a civil action:

- To recover benefits due under the terms of a plan
- To enforce rights under the terms of a plan –or–
- To clarify rights to future benefits under the terms of a plan

Since these actions require reference to a plan's terms, they are contractual in nature. By contrast, Section 510 actions relate to adverse employment actions and are tortious in nature.

Courts may require plaintiffs to rely on Section 502(a)(1)(B) (*29 U.S.C. § 1132(a)(1)(B)*) rather than Section 510 if the nature of the action is contractual rather than tortious. As a general rule, if a plaintiff's position is that he or she is entitled to benefits under the terms of a plan (either directly or as a beneficiary), the claim falls under Section 502(a)(1)(B).

If the plaintiff is not entitled to benefits under the terms of a plan, including if he or she is seeking a reformation of the plan's terms to provide for such entitlement, the claim falls under Section 502(a)(3) (*29 U.S.C. § 1132(a)(3)*).

Breach of Fiduciary Duty Claims

Under ERISA Section 502(a)(2) (*29 U.S.C.* § *1132(a)(1)(B)*), the secretary of the Department of Labor, a participant, a beneficiary, or a fiduciary may bring a civil claim for appropriate relief under ERISA Section 409 (29 U.S.C. § 1109). Section 409 establishes personal liability for breaches of fiduciary duties under ERISA. In addition to compensation for losses and restoration of ill-gotten profits, a breaching fiduciary is "subject to such other equitable or remedial relief as the court may deem appropriate . . . " (29 U.S.C. § 1109(a)).

Plaintiffs should consider bringing breach of fiduciary duty claims in addition to Section 510 claims because they can be easier to prove and may have a longer limitations period. However, these claims have some inherent restrictions. They are only available against a fiduciary involved with the adverse employment action. They must relate to plan-wide injuries caused by a fiduciary breach; however, plaintiffs may recover for financial losses incurred with respect to their individual interests as a result of plan-wide injuries.

For more information, see Fundamentals of ERISA Fiduciary Duties and Employee Benefits Law § 12.04.

Estoppel Claims

Courts have recognized equitable estoppel claims under federal common law. The claims are allowed somewhat sparingly under ERISA because of courts' disinclination to supplement or undermine its statutory remedies provisions. However, you should keep in mind that they are available under the right set of facts.

Criminal Matters

ERISA Section 511 (29 U.S.C. § 1141) is the criminal law analogue of Section 510. It prohibits the use of fraud, force, violence or threat of the use of force or violence to restrain, coerce, intimidate or attempt to restrain, coerce or intimidate any participant or beneficiary for the purpose of interfering with or preventing the exercise of any rights under ERISA or a plan. Willful violations can result in a $100,000 fine, 10 years imprisonment, or both. While criminal prosecutions are rare, employers should be aware of the potential for them.

Other Nondiscrimination Claims

Section 510 claims are often brought with claims of discrimination under other federal and state laws. Section 510 claims alleging interference with retirement benefits are often accompanied by claims under the Age Discrimination in Employment Act (ADEA) and similar state laws. Section 510 claims alleging interference with health and disability benefits are often accompanied by claims under the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA) and analogous state laws. For more information, see Unjust Dismissal § 11.03.

Preemption of Many State Laws

Section 510 claims are often brought with claims under state employment discrimination laws. Frequently, these claims are found to be preempted by ERISA, as discussed below.

Preemption Analysis

Generally, under ERISA preemption, ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan [subject to ERISA] . . . " (29 U.S.C. § 1144). The Supreme Court has recognized the expansiveness of this language, stating that a law, like a state law, "relates to an employee benefit plan in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Ingersoll-Rand Co. v. McClendon, 494 U.S. 1078 (1990)*; New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995). More recently, the Supreme Court has taken a more restrictive, pragmatic view of this language. In its latest pronouncement on ERISA's preemption clause, the Supreme Court stated that state laws are preempted by ERISA if they:

- Act immediately and exclusively upon ERISA plans or where the existence of ERISA plans is essential to the laws' operation
- Govern a central matter of plan administration or interfere with nationally uniform plan administration –or–
- Force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers

Gobeille v. Liberty Mut. Ins. Co., 136 S. Ct. 936 (2016).

For an additional discussion on ERISA preemption, see Employment Law Deskbook § 14.02

Commonly Preempted Claims

State law claims of wrongful discharge primarily motivated by avoidance of contributions to, or benefit payments under, a plan are preempted. Similarly, state law claims of retaliatory discharge for exercise of rights under a benefit plan are preempted. Ultimately, if the crux of a claim is that an employer discharged, fined, suspended, expelled, disciplined, or discriminated against an individual to interfere with rights to plan benefits or in retaliation for the exercise of plan rights or whistleblowing, the claim will be preempted by ERISA and the action may be removed to federal court. See, e.g., Hashimoto v. Bank of Haw., 999 F.2d 408 (9th Cir. 1993). For more information, see Employment Litigation § 3.02.

Affordable Care Act Preemption

The impact of the Affordable Care Act (ACA) on the preemptive effect of ERISA § 502(a) (*29 U.S.C. § 1132(a)*) remedies on state law claims has been a topic of legal discussion. In general, ERISA § 502(a) provides civil enforcement remedies for a plan or insurer's wrongful denial or limitation of benefits. Related state-law-based claims, for example claims of negligent denial of medically necessary care, are preempted, leaving the claimant with the limited § 502(a) remedies of injunctive relief or ordinary contract damages (i.e., the amount of the benefits due).

For a further discussion on the interaction of ACA and ERISA preemption, see Health Care Reform: Law and Practice § 3.02.

Results of Preemption

When litigating ERISA cases, where a state claim is preempted, defendants will usually move to have it dismissed and to remove the case to federal court (if it is not already there). If plaintiffs have not pleaded a claim under Section 510, courts will usually allow them to amend their complaints to add such a claim.

Procedural Matters for Bringing Section 510 Claims

ERISA's Civil Enforcement Provision

ERISA's civil enforcement provision (*29 U.S.C. § 1132*) applies in the enforcement of Section 510. Under ERISA Section 502(a)(3) (*29 U.S.C. § 1132(a)(3)*), a participant, a beneficiary, or a fiduciary may bring a civil claim to:

- Enjoin acts or practices that violate ERISA or a plan's terms
- To obtain "other appropriate equitable relief" to address those violations or enforce ERISA provisions

This subsection is usually the basis for bringing claims for violations of Section 510.

Standing

Participant Defined

For purposes of identifying potential plaintiffs under ERISA Section 502(a)(3), a "participant" is "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit." ERISA § 502(a)(3) (*29 U.S.C. § 1132(a)(3)*).

Beneficiary Defined

A "beneficiary" is "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." ERISA § 3(8) (29 U.S.C. § 1002(8)).

Generally, Section 510 does not protect job applicants. Courts reason that an adverse employment action cannot be shown in the absence of an employment relationship. However, a refusal to rehire or recall from layoff to prevent attainment of rights under a benefit plan might be actionable under Section 510.

Proper Defendants

Although Section 510 allows claims against "any person," many courts decline to allow claims against non- employers. These courts reason that the list of actions required to state a claim and the required ties to either ERISA or an employee benefit plan strongly imply that claimants must be in employment relationships with defendants.

Other courts will allow claims against defendants with quasi-employer status and against insurance companies, third-party administrators and union plan trustees, particularly in the context of interference claims.

Exhaustion of Claims Procedures

ERISA Section 503 (29 U.S.C. § 1133) requires every "employee benefit plan" to maintain claims procedures that afford a reasonable opportunity for full and fair review for a participant whose claim for benefits has been denied. ERISA does not specifically require plan participants or beneficiaries to exhaust plans' claims procedures before filing a lawsuit. However, courts have developed an "exhaustion doctrine" to that effect.

The vast majority of courts require exhaustion of claims procedures if a plaintiff's claim is for benefits under the terms of a plan. There is a split of authority as to whether exhaustion is required if a plaintiff's claim is based upon a statutory violation, as is the case with Section 510 claims. The Third, Ninth, and Tenth Circuit Courts of Appeals have held that exhaustion is not required for a plaintiff bringing a claim under ERISA Section 510. By contrast, the Fifth, Seventh, and Eleventh Circuit Courts of Appeals appear to require exhaustion for all ERISA claims.

Even courts in these jurisdictions may excuse a failure to comply with the exhaustion requirement if the individuals lack access to review mechanisms or if seeking review would be futile under the circumstances.

Statute of Limitations

ERISA does not provide a statute of limitations for Section 510 claims. Rather, courts apply the most analogous state law statute of limitations, which is usually the provision for bringing wrongful discharge or employment discrimination claims. Litigants should consult decisions of federal courts sitting in the relevant state to identify the applicable statute of limitations. For more information, see Unjust Dismissal § 11.03, at Paragraph 11.

Plan Limitation on Litigation of Benefit Claims

Instead of relying on the closest state statute of limitations, you should specify in the ERISA plan a contractual limitations period for bringing a lawsuit. The contractual limitations period should be in the summary plan description (SPD) and in any claim denial notice, since those are the documents provided to participants.

Proving Violations of Section 510

To state a Section 510 claim, a plaintiff is required to show direct evidence that the employer had specific intent to violate ERISA. In the absence of such direct evidence, courts have applied a shifting burden analysis similar to that applied in Title VII employment discrimination cases. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Elements of a Section 510 Claim

Section 510 is not a model of statutory draftsmanship. The Seventh Circuit Court of Appeals referred to it as “a mess of unpunctuated conjunctions and prepositions.” George v. Junior Achievement of Cent. Ind., Inc., 694 F.3d 812 (7th Cir. Ind. 2012). Due to these shortcomings and the fact that Section 510 allows three types of claims, there is a lack of uniformity in the language courts use when pronouncing the elements of Section 510 claims. Litigants should reference the leading decisions of the relevant Circuit Court of Appeals for the applicable formulation of a Section 510 claim.

Plaintiffs may prove their Section 510 claims through the use of direct or indirect evidence. For additional information, see Employee Rights Litigation: Pleading and Practice § 2.09.

Direct Evidence

Direct evidence consists of the proverbial smoking gun.

For example, in a case decided by the Third Circuit Court of Appeals, an employer systemically laid off employees to prevent them from vesting under its pension plan. This “liability avoidance” program used a scattergraph to identify and target particular employees tied to unfunded pension liabilities. A “liability avoidance tracking system” or “Red Flag” system was put in place to ensure that targeted employees were not inadvertently called back to work. The Third Circuit had no trouble finding that this program was direct evidence of discrimination. Gavalik v. Continental Can, 812 F.2d 834 (3rd Cir.), cert. denied, *484 U.S. 979 (1987)*.

Another example of a case involving direct evidence of discrimination was Lessard v. Applied Risk Management, 307 F.3d 1020 (9th Cir. 2002). In that case, parties to a company asset sale structured the purchase agreement to require employees on leave to return to active, full-time status for their employment to transfer to the buyer after the closing. Other employees’ employment transferred automatically. After finding that the purchase agreement facially discriminated against employees on leaves of absence, the Ninth Circuit Court of Appeals reversed the lower courts’ grant of summary judgment for the company on the employee’s Section 510 claims.

Indirect Evidence

If claims are based on indirect evidence, courts apply the familiar burden-shifting paradigm developed in cases under Title VII of the Civil Rights Act of 1964. See, e.g., Business Organizations with Tax Planning § 103E.06, Paragraph [1]. Initially, plaintiffs must demonstrate, by a preponderance of the evidence, a prima facie case of unlawful discrimination under Section 510 consisting of the following elements:

- **Prohibited conduct.** The plaintiff must demonstrate prohibited conduct. Prohibited conduct is a discharge, fine, suspension, expulsion, discipline, or discrimination. These are referred to collectively herein as “adverse employment actions.” The most common actions are termination of employment and changes in status such as demotions, transfers, or reclassifications.

- **Specific discriminatory intent.** Discrimination must be a motivating factor for the adverse employment action; however, discrimination need not be the sole motivating factor. Plaintiffs must show specific evidence, not speculative and conclusory allegations, to prove specific intent. This is the linchpin of all Section 510 claims.

- **Loss of entitled right or benefit under employee benefit plan.** Plaintiffs must show a loss of an entitled right or benefit under an employee benefit plan. An entitled right is broader than a "vested" right because it can encompass rights to future contributions and welfare benefit rights.

If plaintiffs establish a prima facie case, defendants may offer legitimate reasons for taking adverse employment actions which usually fall into one of the following categories:

- Employee misconduct
- Poor job performance workplace restructuring –and–
- Economic hardship and reduction of expenses

Finally, plaintiffs must demonstrate that proffered legitimate reasons are pretexts for unlawful discrimination or retaliation. Case law is instructive in determining how to make this showing. The following factors can be relevant depending on the facts underlying the claims:

- **Strength of the employer's evidence supporting its proffered legitimate reason for taking adverse employment action.** For example, if an employer asserts that an employee was terminated for failure to meet job requirements, a human resources file documenting multiple instances of the employee's shortcomings can be powerful evidence against a claim of pretext. Also, an employer's position can be bolstered by showing that it followed established, written policies and procedures. Conversely, an employer's inconsistent explanations for taking adverse employment actions, demonstrated history of treating an affected group worse than others, or administering punishment that is disproportionate to the alleged offense, may bolster a claim of pretext.

- **Temporal proximity of the exercise of an employee benefit right to the adverse employment action.** Close proximity may support a finding of pretext; a significant lapse of time may undermine a claim of pretext.

- **Cost savings to the employer resulting from an adverse employment action.** Plaintiffs must show more than an employer's knowledge of cost savings. Rather, cost savings must be the reason for an adverse employment action. Courts are more likely to find that cost savings have probative value if the alleged discrimination affects a class of individuals rather than a single employee. The size and health of the business can also be factors in determining whether cost savings were truly the motivation for an adverse employment action.

- **Contingencies and the length of time before an individual could enjoy purportedly wrongfully denied benefit.** For example, if an individual would have to work a lengthy period of time to become entitled to supplemental pension benefits or would have to wait a number of years after termination of employment to receive them, courts will be less inclined to find that a proffered reason is a pretext.

- **Treatment of similarly situated individuals.** If an employer took no action or less severe action against similarly situated individuals accused of similar actions in the past that may be used to show that a more severe sanction against an employee, such as termination of employment, was a pretext for unlawful discrimination.

- **Awareness of adverse impact.** An important consideration is whether the individual who made the decision to take adverse employment action was aware of the plaintiff's participation in a plan, or the implications of the action to the plaintiff's rights and interests in a plan.

- **Unlawful discrimination must prevent benefit eligibility.** Whether the participant or beneficiary would be eligible for benefits under the terms of a plan even in the absence of unlawful discrimination.

Special Issue with Whistleblower Claims

Anti-retaliation provisions exist in a number of federal statutes, declaring unlawful the discharge or discriminatory treatment of employees who file charges alleging that their employers' actions violate those statutes, or who otherwise initiate or participate, assist, or testify in investigations or proceedings brought under those statutes against their employers. Anti-retaliation provisions are often drafted with sufficient breadth that they can also be construed as whistleblower provisions that protect the employee who reports violations affecting the employee, but also of other workers or the public.

The federal appeals courts are split about whether unsolicited internal complaints concerning ERISA violations are protected activities under Section 510. The Fifth, Seventh, and Ninth Circuit Courts of Appeals have concluded that these complaints are protected activities. The Second, Third, Fourth, and Sixth Circuit Courts of Appeals have concluded that these complaints are not protected activity under Section 510. The Department of Labor has written amicus curiae briefs consistently urging that informal complaints are protected activities under Section 510.

The split between the courts has developed due to conflicting interpretations of the ambiguous phrases "given information" and "any inquiry or proceeding." The courts that broadly construe the whistleblower provision interpret these terms to encompass more than the giving of testimony in a formal context. For these courts, protected activity can include informal, oral complaints to a supervisor, or human resource administrators. No formal proceeding need be underway at the time of the complaint; the complaint itself can be viewed as the first step of an inquiry or proceeding. These courts reason that any other construction would give employers a perverse incentive to discharge potential whistleblowers because doing so would prevent the occurrence of a formal inquiry or proceeding.

By contrast, the courts that narrowly construe the whistleblower provisions often compare them to the whistleblower provisions of the Fair Labor Standards Act. This comparison tends to result in the courts focusing on whether there is an inquiry or proceeding under the circumstances, regardless of the level of formality involved. Under this analysis, unsolicited internal complaints fall outside the protections of Section 510. If the employer is merely a passive recipient of information, no inquiry (let alone proceeding) can be said to exist. Only the employer can initiate an inquiry—either by asking questions of the employee or conducting a more formal investigation. For more information, see Unjust Dismissal § 11.03.

ACA

The Patient Protection and ACA contains whistleblower provisions that preclude employers, group health plans, and health insurance issuers from retaliating against individuals who engage in protected activity under the ACA. Protected activity includes reporting potential ACA violations or receiving tax credits or subsidies through government health care exchanges. For more information, see Understanding the Whistleblower Provisions of the ACA.

Remedies

Depending on the type of adverse employment action involved, affected employees could justifiably seek reinstatement to their positions, back pay, front pay, restitution of forfeited benefits, payment of benefits wrongfully denied, service credit for vesting or entitlement to supplemental benefits, restoration of seniority, and other remedies available in wrongful discharge and discrimination cases.

However, ERISA Section 502 is the exclusive enforcement mechanism for Section 510 claims. As a practical matter, Section 510 claims are brought under Section 502(a)(3). Thus, the remedies available to plaintiffs under Section 510 are the remedies available under Section 502(a)(3). These remedies include injunctions and "other appropriate equitable relief."

Equitable Relief under Section 502(a)(3)

The U.S. Supreme Court has addressed the meaning of the phrase other appropriate equitable relief under Section 502(a)(3) (*29 U.S.C. § 1132(a)(3)*) many times in recent years. In an early opinion in this recent spate of cases, the court stated that the term refers to "those categories of relief that were typically available in equity . . . " Mertens v. Hewitt, 508 U.S. 248 (1993). Many practitioners were not immediately familiar with the types of relief that were typically available in equity during the period of the divided bench. Soon after dusting off their equity hornbooks, practitioners came to realize that identifying equitable remedies would not be easy given some of the esoteric distinctions made by equity courts. Moreover, the well-accepted principle that money damages were not available in equity made the outlook for participants and beneficiaries quite grim. There was a general sense that participants and beneficiaries would be left with no meaningful remedies under Section 502(a)(3).

However, in Cigna v. Amara, 563 U.S. 421 (2011), the Supreme Court identified several types of equitable relief that may actually be meaningful to participants and beneficiaries. 563 U.S. 421 (2011). In addition to injunctions, participants and beneficiaries could seek equitable relief in the form of reformation of a plan's terms, a surcharge (for example, an order requiring fiduciaries to abide by the terms of a reformed plan's terms) and estoppel. The Court described a surcharge as "'monetary' compensation for a loss resulting from a trustee's breach of duty, or to prevent the trustee's unjust enrichment." Cigna v. Amara, at 441. In effect, the Court provided a roadmap for bringing equitable claims under ERISA § 502(a)(3) (*29 U.S.C. § 1132(a)(3)*). Notably, courts have also recognized reinstatement and, in some circumstances, restitution, as equitable remedies in the employee plan context. For more information, see Employee Benefits Law 12.04.

Attorney's Fees

Courts have discretion to award reasonable attorney's fees and costs to either party to an action under ERISA Section 510. A fee claimant need not be a prevailing party to be eligible for attorney's fees; it is sufficient to have some success on the merits.

Section 510 Litigation Relating to the Patient Protection and Affordable Care Act

Courts have discretion to award reasonable attorney's fees and costs to either party to an action under ERISA Section 510. A fee claimant need not be a prevailing party to be eligible for attorney's fees; it is sufficient to have some success on the merits.

The Patient Protection and Affordable Care Act (the ACA) dramatically changed the way that health insurance coverage is provided in the United States. For information covering the ACA, see Health Care Reform: Reform and Practice. Among other things, the ACA requires employers of a certain size to offer health coverage to their full-time employees or be at risk for sizable excise taxes. The ACA may prove to be very fertile ground for Section 510 claims.

Employer Shared Responsibility Provisions of the ACA

Generally, the ACA applies to employers with an average or 50 or more full-time employees or full-time equivalents in the preceding calendar year. For this purpose, a "full-time employee" is a common law employee who averages at least 30 hours of service per week during a month. Part-time employees' hours are aggregated to create full-time equivalent figures to determine whether the 50 employee threshold has been satisfied and whether an employer is thus subject to the ACA shared responsibility requirements.

Among other things, the ACA requires covered employers to offer minimum essential health care coverage to substantially all of their full-time employees or be subject to excise taxes. ACA does this by requiring "applicable large employers" to "play-or-pay." They must either play by making coverage available to full-time employees (those who work 30 hours or more on average per week), or pay by paying an excise tax penalty. The pay-or-play mandate is sometimes referred to as a "free rider surcharge" or a "free rider penalty." An "applicable large employer" is one that employs an average of at least 50 employees on business days during the preceding calendar year.

- **Section 4980H(a).** Under I.R.C. § 4980H(a), a covered employer that fails to offer minimum essential health coverage to at least 95% of its full-time employees is subject to an annual penalty of $2,000 (adjusted annually) multiplied by the total number of the employer's full-time employees in excess of 30 full-time employees. This excise tax is triggered if any full-time employee receives a premium tax credit for coverage purchased through a marketplace. The subsection (a) penalty is designed to cause employers to offer health coverage to a broad group of their employees.

- **Section 4980H(b).** Under I.R.C. § 4980H(b), a covered employer is subject to an annual penalty of $3,000 (adjusted annually) multiplied by the total number of full-time employees who receive subsidized marketplace coverage. This excise tax is also triggered by a full-time employee receiving a premium tax credit for coverage purchased through a marketplace and applies regardless of whether the employer offers minimum essential coverage that is affordable and provides minimum value to at least 95% of its full- time employees. The subsection (b) penalty is designed to cause employers to offer *quality* health coverage to their employees.

For more information about the ACA mandates, see Employee Benefits Guide § 10.16.

Avoidance of Excise Taxes under the ACA

Predictably, many employers have tried to avoid or minimize their exposure to these excise taxes. Whether employers are trying to avoid being subject to the ACA, or to avoid or minimize excise taxes triggered by failures to make offers of coverage or adequate offers of coverage, the ACA's structure incentivizes them to take adverse employment actions against their employees. These actions include discharges, reductions in hours to achieve part-time status and coercive transitions to independent contractor status.

Dave & Buster's Litigation

The hospitality industry is among the hardest hit by the ACA's coverage mandates. These businesses tend to have large numbers of hardworking but low-paid and unskilled employees. The cost of health coverage provided on ACA- compliant terms can equal or exceed many of these employees' salaries and wages. Fearing skyrocketing human resource expenses, many hospitality businesses view the ACA as an existential threat and have reacted by taking preemptive measures designed to lessen ACA's impact on their businesses. Dave & Busters, Inc. was among them, alleging violation of ERISA Section 510 (29 U.S.C. § 1140) by cutting employee hours to deny them health benefits. Marin v. Dave & Buster's, Inc., 159 F. Supp. 3d 460 (S.D.N.Y. 2016).

Maria De Lourdes Parra Marin sued her former employer, Dave & Busters, Inc., for discrimination under Section 510. The class action complaint was filed on behalf of approximately 10,000 hourly employees whose hours were allegedly involuntarily reduced resulting in a loss of coverage under Dave & Busters, Inc.'s health plan or an offer of "inferior" health coverage.

The complaint alleges several communications by managers and company executives that may be used to show "specific intent" under Section 510 and which sought "to obtain appropriate equitable relief" for acts of discrimination under Section 510. The class action complaint specifically seeks:

- Reinstatement of employees to their prior full-time positions
- Restoration of rights to participate in the company's plan that complies with the requirements of the ACA
- Being made whole for:
  - Loss of wages and benefits, with interest, from the date of the reduction of hours and benefits
  - Costs of health insurance obtained to replace coverage under the company's plan –and–
  - Reimbursement for out-of-pocket costs for medical claims to the extent that they would have been paid as if they had continued to participate in the company's plan –and–
- Reasonable attorneys' fees and costs

Dave & Buster's, Inc. filed a motion to dismiss for failure to state a claim under Section 510. In denying the motion, the court found that the complaint alleged intentional interference with current health care coverage motivated by concern about future costs supported by factual allegations. The reduction in hours "affected [Ms. Marin's] employment status, her pay and the benefits she had and to which she would be entitled." Accordingly, the court concluded that "the complaint states a plausible and legally sufficient claim for relief, including, at this stage, [Ms. Marin's] claim for lost wages and salary incidental to the reinstatement of benefits."

Based on what we can discern from the pleadings and the court's ruling on the motion to dismiss, the plaintiffs will likely attempt to establish their claims on the basis of direct evidence of discrimination under Section 510. Perhaps the company will claim that its fiduciary obligation to its shareholders and disclosure obligations under securities law could not be reconciled with the constraints of Section 510. The subtext of such a claim is that the company should not be singled out for punishment just because it was honest and forthright (perhaps to a fault) about its actions.

A case management conference is set for March 10, 2017. A ruling on class certification could be made as soon as May 2017.