CFO

CAPPING HOURS TO AVOID ACA COSTS COULD VIOLATE ERISA

It's a strategy a lot of employers are mulling over, but liability issues may arise if it's not done very carefully.

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From a purely dollars-and-cents perspective, most companies would save money, and quite a bit of it, by opting to pay the penalties stipulated in the Affordable Care Act for failing to provide health-care coverage for employees.

But even the vast majority of companies that are expected to comply with the ACA's employer mandate, when it takes effect in 2015, might be tempted to try to cheat the law's full intended economic impact. One idea many companies have been toying with is to cap weekly hours worked below 30 for certain employees, thereby converting them into part-timers who do not trigger such provisions.

That quick-and-dirty solution, however, is hardly a satisfactory one. Companies that try to feign compliance with the ACA by reducing an employee's hours will risk running afoul of a different federal law — namely, the Employee Retirement Income Security Act (ERISA). In particular, Section 510 of ERISA prohibits companies from discharging, fining, suspending, expelling, disciplining or discriminating against an employee if the action is taken "for the purpose of interfering with the attainment of any right to which [the employee] may become entitled."

Decreasing employees' hours to disqualify them from full-time status, if done to interfere with their right to health-care coverage under the ACA, just might violate that ERISA provision.

At the first stage of a Section 510 action, an employee must establish prohibited employer conduct taken for the purpose of such interference. Once that's done, the employer must produce a legitimate reason for its action — for example, that the modification of hours was part of a pragmatic business decision, or flowed from its desire to mitigate its tax obligations rather than a specific intent to interfere with the employee's benefits. Once the employer has proffered such a reason, the employee must produce evidence that it's merely a pretext. If successful, an employee can lay claim to the benefits owed, attorneys' fees and other monetary remedies.

In light of the potential for financial exposure (not to mention the bad press) that follows an ERISA violation, companies should not be over-eager to enact workforce changes that focus singularly on lessening the financial impact of the employer mandate.

To achieve the dual goals of managing health-care costs and avoiding ERISA liability, a company must enact any changes in its workforce management in thoughtful and measured steps. Because a Section 510 suit turns on a finding of specific intent to interfere with an employee's health-care rights, employers must be prepared to combat any misperception that their actions were taken for that purpose. Here are a few pointers:

1. First and foremost, companies must monitor all external communications. They should coach management to avoid public statements about employment policy. To the extent public

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statements are unavoidable, all levels of management should be communicating a consistent message that explains a company's business reasons for taking such actions.

2. Companies must ensure that all internal communications about workforce management track their publicly made statements and likewise set forth the business needs served by changes in the workforce policy.

3. To the extent possible, management should make any sensitive internal communications in a way that triggers attorney-client privilege.

4. When making alterations to workforce hours, companies should avoid any sweeping changes. Since wholesale reductions of hours for large tiers or segments of employees are most likely to invite unwanted scrutiny, companies would be wise to leave the hours of existing full-time employees largely unchanged. If economically necessary, companies may enact a new workforce policy that caps hours only for new hires, or consider outsourcing new work to contract employees who make a smaller financial dent on a corporate budget.

While the merits of a Section 510 claim based on the reduction of an employee's hours to circumvent the ACA is a subject that has yet to be hashed out in the courts, it is certainly not one that companies want to face down in the future. As such, now is the time for companies to work out the details of business strategies that avoid ERISA liability.

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