



# Proposed Settlement in Dave & Buster's ERISA Class Action Lawsuit

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A settlement has been preliminarily approved in the lawsuit filed against Dave & Buster's (D & B) by current and former employees alleging the company's nationwide reduction of employees' work hours was motivated by an intent to reduce costs for the company by restricting employee eligibility for the company health plan. D & B has reportedly agreed to pay more than \$7.4 million to workers whose scheduled hours were cut.

## ■ Background

The Affordable Care Act (ACA) became law on March 23, 2010. The ACA's employer mandate requires employers with more than 50 full-time employees to offer health insurance to 95% of their full-time employees or pay penalties. The ACA defines "full-time" as working 30 or more hours a week. Prior to the ACA, many employers offered health insurance to employees who worked at least 35 or 40 hours per week. Those employers were faced with the choice of expanding the eligibility criteria of their health plans, or risking penalties under the ACA.

The Employee Retirement Income Security Act of 1974 (ERISA) places certain duties on private employers

that sponsor certain employee benefit plans. One of the protections under ERISA prevents anyone, including an employer, from discriminating against a plan participant for the purpose of interfering with a right or the attainment of a right protected by ERISA. Eligibility for health insurance is protected by ERISA.

## ■ Marin v. Dave & Buster's, Inc.

According to the lawsuit filed in May of 2015, in response to the ACA employer mandate, D & B decided to manage its employee work schedules in order to restrict the number of hours employees could work per week. It was alleged that D & B reduced employees' scheduled work hours specifically to limit employee eligibility for health insurance for the purpose of minimizing costs imposed by the ACA. There were two outcomes of the schedule reductions that became the subject of the lawsuit:

- Some employees that were enrolled in D & B's group health plan lost eligibility
- Some employees that were eligible to enroll for D & B's group health plan lost eligibility

The lawsuit was significant because it alleged that D & B violated ERISA when it chose to reduce its employees' scheduled hours to avoid the ACA penalties, on the theory that intending to eliminate or prevent eligibility for the health insurance plan was prohibited interference under ERISA §510. Initially, D & B denied all the claims made in the lawsuit and tried to have the case dismissed. The Court denied the motion to dismiss and the parties proceeded with the litigation while negotiating a settlement. Ultimately, a settlement was reached and preliminarily approved by the court on December 18, 2018. A final approval hearing is scheduled in May of 2019.

## ■ Employer Considerations

As with most settlements, there is unlikely to be any admission of wrongdoing on the part of D & B or any bright lines established by the court. However, the D & B litigation and preliminary settlement serve as an important reminder of the ERISA fiduciary rules and potential consequences when these rules aren't followed. While the employer mandate forced many employers to evaluate their plan eligibility rules to understand potential penalty exposure and risks, as the D&B case illustrates, careful consideration of the ERISA fiduciary rules should also be a part of this evaluation.

