

LEGISLATIVE UPDATE

March 2016

Dave & Buster's facing alleged ACA and ERISA violations

In a class action suit pending in the Southern District of New York, a Dave & Buster's employee alleges the company cut her hours to avoid the obligation of providing health insurance under the Affordable Care Act. The complaint states the plaintiff worked full time from 2006 until June 2013 at the restaurant's Time Square location. At that time the named plaintiff, and the rest of the location's more than 100 full time employees, were told that in response to the enactment of the Affordable Care Act, the number of full time employees would be reduced to approximately 40. The plaintiff's hours were subsequently reduced to an average of 17 hours per week. Following the reduction in hours, the plaintiff was notified that she was no longer eligible for the company's health insurance.

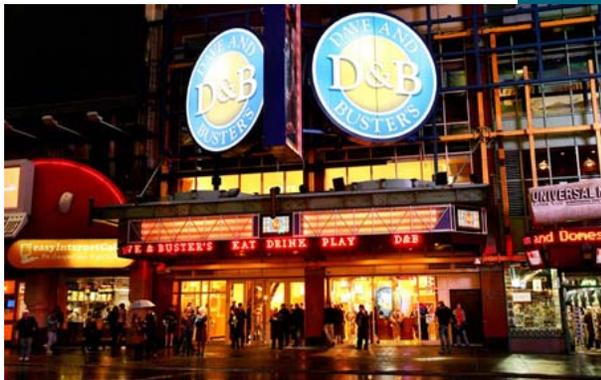
In response to the reduction in hours and termination of health care coverage, the plaintiff brought a class action suit alleging discrimination under ERISA, which states in part:

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, ... or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan[.]

29 U.S.C. s. 1140.

Dave & Buster's filed a motion to dismiss the claim for failing to state a cause of action, arguing that employees do not have a right to employee benefits that have not yet accrued. Last month, the District Court for the Southern District of New York ruled against Dave & Buster's, and in favor of the plaintiff, noting that Dave & Buster's actions cause this plaintiff to lose benefits she had already been entitled to receive. The court's ruling, *Marin v. Dave & Buster's, Inc.*, Case No. 15 Civ. 3608, 2016 WL 526542 (Feb. 9, 2016), will allow the matter to proceed toward trial. It also marks the first case in which a court has been asked to look at an employer's purposeful reduction in employee hours to thwart insurance coverage under the ACA.

The Dave & Buster's case, which has now cleared the first hurdle of litigation, may be the first of an onslaught of class actions bringing similar claims



New I-9 form coming

In November, the U.S. Citizenship and Immigration Services proposed a new "smart" I-9 form. The current I-9 form is set to expire March 31, 2016. While the comment period has ended on the proposed form, a final form has not yet been released. When available, employers can expect the new form to be a computer friendly fillable PDF form, with drop

down menus and instructions hyperlinked to each information box. The new form, when filled out electronically, will also populate responses to subsequent questions based upon answers to other related questions. Employers should be on the lookout for the new form, as using outdated I-9 forms may result in fines and penalties. Once released, the new I-9 form will be available at <http://www.uscis.gov/i-9>

EEOC attempts to tackle LGBT discrimination head on

For the past few years, the EEOC has been active in bringing discrimination claims involving LGBT employees before courts. Previously, the EEOC has primarily relied upon arguments that discrimination against these individuals is a form of gender discrimination under Title VII. These arguments have proved largely successful. In internal administrative proceedings, the EEOC has previously found that LGBT discrimination is unlawful under Title VII. In two cases filed on March 1, 2016, the EEOC now asks two federal courts to make similar findings.



In the Western District of Pennsylvania, the EEOC has filed a case on behalf of a gay male health care employee. He alleges he was subject to harassment because of his sexual orientation that included anti-gay slurs and offensive comments made by his manager. The employee alleges he made several complaints, but ultimately quit when nothing came of the complaints.

The second case, filed in the District of Maryland, the EEOC alleges a lesbian manufacturing employee was harassed by her supervisor regarding her appearance, making sexual innuendos and lewd gestures. The EEOC alleges that when she complained to management about the harassment, the company failed to address the complaint and instead fired her.

As these cases were only filed this month, it will be some time before the issue of whether sexual orientation is directly protected by Title VII comes before the courts for a ruling.

EEOC announces changes in investigations

On February 18, 2016, the EEOC announced recently enacted changes in the way it handles investigations of discrimination. Last month, the Commission departed from its former position of allowing investigating officers latitude in how they investigate charges, opting instead for a standardized method that is intended to be deployed in every field office. The EEOC will now require all employers to file their position statements online. Further, the statements and supporting documents, previously kept confidential from charging parties, will now be released to the charging party upon request.

Employers should take care not to include any private, confidential, or proprietary information in their position statements going forward. While the EEOC will release the employers statements to charging parties, it will not similarly release the charging parties' responses to employers. **These new changes will retroactively apply to all positions statements filed on or January 1, 2016.**

Additional information about these changes may be found here: http://www.eeoc.gov/eeoc/newsroom/release/position_statement_procedures.cfm

Mark S. Barnes
mbarnes@bugbeelawyers.com

Carl E. Habekost
chabekost@bugbeelawyers.com

Dana R. Quick
dquick@bugbeelawyers.com

Tybo Alan Wilhelms
twilhelms@bugbeelawyers.com

BUGBEE
& CONKLE

www.bugbeelawyers.com