

Can You Blow the Whistle Anywhere? Internal Complaints Under ERISA Section 510

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I. INTRODUCTION

For decades, employee benefit plans have provided financial security and accessible capital during retirement for laborers worldwide. The United States first introduced its large-scale pension plans in the wake of the Civil War.¹ Due to the leadership of various labor unions in the decades following the war, many state and local governments, as well as private corporations, established such plans for their employees.² As of 2007, approximately 124 million employees maintained retirement plans.³

By the end of the twentieth century, the growth of employee retirement benefit plans caused an increase in claims of abuse regarding employer compliance.⁴ In response, regulation attempts began at the state and local levels.⁵ In 1974, however, the federal government stepped in with a comprehensive system of regulation entitled the Employee Retirement Income Security Act ("ERISA").⁶ This statute establishes disclosure requirements and puts in place systematic enforcement mechanisms to ensure uniformity and consistency.⁷

ERISA establishes various reporting and disclosure requirements in accordance with its stated policy to increase the likelihood that participants and beneficiaries under employer-provided pension plans will receive their full benefits.⁸ The administrator of each employee benefit plan must furnish⁹ to each plan participant and beneficiary a

¹ Justin Cummins & Meg Luger Nikolai, *ERISA Reform in a Post-Enron World*, 39 J. MARSHALL L. REV. 563, 563 (2006).

² *Id.*

³ U.S. DEP'T OF LABOR, EMP. BENEFITS SEC. ADMIN. PRIVATE PENSION PLAN BULLETIN HISTORICAL TABLES AND GRAPHS (2010), available at <http://www.dol.gov/ebsa/PDF/2007pensionplanbulletin.PDF>.

⁴ S. REP. NO. 93-127, at 3 (1973).

⁵ *Id.*

⁶ Employee Retirement Income Security Act, 29 U.S.C. §§ 1001–1461 (2006).

⁷ See *supra* note 4, at 1–2.

⁸ 29 U.S.C. § 1001b(c)(3) (2006).

⁹ See 29 U.S.C. § 1024(b) (2006). In conjunction with certain required timeframes within which the plan administrator must furnish information to the plan participants and beneficiaries, the administrator is also required to furnish such information as may be received, in the form of a written request, by the participant or beneficiary. *Id.*

summary of the plan description¹⁰ and pension benefit statements¹¹ at designated intervals.¹² Plan administrators must also file reports, including publicly accessible financial and actuarial statements along with opinions issued by independent qualified specialists.¹³ In addition to the mandatory disclosure requirements, ERISA permits the Secretary of Labor¹⁴ to issue regulations establishing further responsibilities for plan administrators. For example, the Secretary may require, by regulation or otherwise,¹⁵ that the administrator furnish to each participant and beneficiary a statement of his or her rights.¹⁶ The comprehensive duty to disclose, together with the reporting requirements enumerated in section 1021, are indicative of the extensive responsibility endowed upon plan administrators and of Congress's desire to ensure that the interested parties are well informed.

ERISA also establishes certain participation and vesting requirements. For example, an employer may not condition participation in the plan on an employee's completion of a term of service extending beyond either the later of one year of service, or the employee's twenty-first birthday.¹⁷ Each pension plan must provide that an employee's rights to his normal retirement benefits, his own contributions, and one hundred percent of his employer's contributions after a certain period of service, are nonforfeitable¹⁸ upon the attainment of normal retirement

¹⁰ See 29 U.S.C. § 1022(a) (2006). Each plan must include the required information specified in § 1022(b) and must be written, "in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." *Id.*

¹¹ The statements shall include: the total benefits accrued and the nonforfeitable pension benefits. It shall be written in a manner calculated to be understood by the average plan participant, and may be delivered in any appropriate form so long as it is reasonably accessible to the participant or beneficiary. See § 1025(a)(1)(B)(ii)(2) (2006).

¹² See 29 U.S.C. § 1025 (2006).

¹³ 29 U.S.C. § 1026 (2006).

¹⁴ See 29 U.S.C. § 1001 (2006). This section explains the dual enforcement responsibilities of the Secretary of Labor and the Secretary of Treasury. For example, the Department of Treasury has statutory authority for minimum standards—funding, participation and vesting of benefit rights. *Id.* The Department of Labor will have statutory authority for fiduciary obligations and veto power over any Treasury decisions that significantly affect collectively bargained plans. *Id.* The Treasury has the authority to audit plans and levy tax penalties, while the Department of Labor maintains the authority to bring a civil action against plans and plan fiduciaries. *Id.*

¹⁵ 29 U.S.C. § 1030 (2006).

¹⁶ 29 U.S.C. § 1024(c) (2006).

¹⁷ See 29 U.S.C. § 1052 (2006).

¹⁸ "Nonforfeitable" is defined in 29 U.S.C. § 1002 as: "[A] claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan." *Id.*

age.¹⁹ Additionally, ERISA establishes certain accrual requirements,²⁰ minimum funding standards,²¹ and the manner and method of benefit payments.²²

Most importantly, in order to secure proper compliance with ERISA's requirements, Congress established plan fiduciaries, whose exclusive purpose is to discharge their duties for the benefit of the participants and beneficiaries.²³ These fiduciaries must act with the same degree of care that a "prudent man" would, if he or she acted in similar circumstances.²⁴ In addition, a fiduciary is liable for any breach of other fiduciaries' responsibilities: (1) if he knowingly participates or conceals any act or omission of another fiduciary, (2) if he enables such other fiduciary to commit a breach, or (3) if he has knowledge of a breach by another fiduciary and makes no effort to remedy it.²⁵ If a fiduciary breaches any of the responsibilities, obligations, or duties imposed by ERISA, then he is personally liable to such plan for any losses resulting from the breach, any profits made through the use of plan assets, and any other equitable relief necessary.²⁶ Conscious of public policy concerns, section 1110 similarly imposes strong burdens on fiduciaries by voiding any provision in an agreement or any other instrument that purports to relieve a fiduciary from responsibility or liability for any obligation or duty established under ERISA.²⁷

To further promote its compliance scheme and foster adherence to the substantive provisions of the Act, ERISA includes a provision protecting individuals against retaliation.²⁸ The antiretaliation provision of ERISA—section 510²⁹—prohibits an employer from discriminating against an employee who has "given information or has testified or is about to testify in any inquiry or proceeding relating to [ERISA.]"³⁰ Similarly, section 510 prohibits the use of coercive interference in the

¹⁹ See 29 U.S.C. § 1053(a) (2006).

²⁰ See 29 U.S.C. § 1054 (2006).

²¹ 29 U.S.C. §§ 1082–1085 (2006).

²² 29 U.S.C. § 1056 (2006).

²³ 29 U.S.C. § 1104 (2006).

²⁴ *Id.*

²⁵ 29 U.S.C. § 1105(a) (2006).

²⁶ 29 U.S.C. § 1109 (2006).

²⁷ 29 U.S.C. § 1110 (2006).

²⁸ *Brock v. Richardson*, 812 F.2d 121, 124 (3d Cir. 1987) (analyzing the antiretaliation and enforcement mechanisms in the FLSA in order to create an environment fostering compliance with the substantive provisions of that Act).

²⁹ Codified at 29 U.S.C. § 1140 (2006), this provision is referred to as "section 510" because it falls within part five, section 510 of the act in its original form. See *Employee Retirement Income Security Act of 1974*, Pub. L. No. 93-406, 88 Stat. 829.

³⁰ 29 U.S.C. § 1140 (2006).

exercise of any right to which a participant or beneficiary is entitled, or may become entitled.³¹

In practice, this statutory definition has elicited varying interpretations as to which employees are protected under section 510; the controversy is based on the form of the information that employees provide with respect to ERISA violations. On one end of the spectrum are employees who give information during the course of a formal administrative or agency investigation, or during litigation. Section 510 undoubtedly protects these employees. At the other end of the spectrum are the employees who, of their own volition, provide information to their employers regarding perceived violations of ERISA. In the middle of the spectrum are the employees who report violations after their employers solicit them for such information.

The two latter categories of employees are the subject of a current circuit split that focuses upon their rights and protections under section 510. The Third and Fourth Circuits held that section 510 does not protect employees who make internal complaints, regardless of form.³² By contrast, the Fifth and Ninth Circuits interpreted section 510 more broadly, holding that it covers all types of internal complaints.³³ The Second Circuit has taken a different approach, holding that employees who provide information after being solicited are protected under section 510, but those who provide unsolicited information are not.³⁴ With the Supreme Court's recent refusal to address the courts' inconsistent applications of section 510 protection, the circuit split remains relevant and highly controversial.³⁵

This Comment argues in favor of a broad application of section 510 protections to unsolicited internal complaints made by participants of ERISA plans to their supervisors or managers. Part II discusses the circumstances surrounding the enactment of ERISA, the purposes and objectives of the statute, and the policy concerns it seeks to address. Part II also introduces two other pieces of federal legislation that contain antiretaliation provisions: the Fair Labor Standards Act ("FLSA")³⁶ and the Civil Rights Act of 1964 ("Title VII").³⁷ These statutes provide a

³¹ 29 U.S.C. § 1141 (2006).

³² *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 223 (3d Cir. 2010); *see also King v. Marriott Int'l Inc.*, 337 F.3d 421, 427 (4th Cir. 2003).

³³ *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311, 1315 (5th Cir. 1994); *see also Hashimoto v. Bank of Haw.*, 999 F.2d 408, 411 (9th Cir. 1993).

³⁴ *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 330 (2d Cir. 2005).

³⁵ *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217 (3d Cir. 2010), *cert. denied*, 131 S.Ct. 1604 (2011).

³⁶ 29 U.S.C. § 215 (2006).

³⁷ 42 U.S.C. § 2000e-3 (2006).

point of comparison because they, respectively, reflect stricter and more lenient antiretaliation provisions than ERISA.

Part III of this Comment addresses the current circuit split regarding the application of section 510 to unsolicited internal complaints. This split places the Fifth and Ninth Circuits at one end of the spectrum and the Third and Fourth Circuits at the other end.³⁸ The Second Circuit further divides the split by utilizing a different approach.³⁹ Part IV provides a detailed analysis of the language used in the whistleblower provisions contained in ERISA, the FLSA, and Title VII. Part IV also discusses the relevant case law that applies the antiretaliation provisions of the FLSA, Title VII, and other statutes to shed light on the relevant ERISA provision. Further, Part IV examines the germane public policy considerations and posits how to preserve the congressional intent behind ERISA while maintaining the rights of employees.

This Comment concludes with a summary of the conflicting authority and the importance of a uniform and consistent application of section 510. It stresses the public policy arguments in favor of a broad application of the whistleblower provision, as well as the inadequacy of a narrow interpretation. Ultimately, it argues that courts should extend security for employees as a mechanism to ensure employer compliance with the terms of this comprehensive piece of legislation.

II. BACKGROUND OF ERISA AND A COMPARISON OF SECTION 510 AND OTHER SIMILAR WHISTLEBLOWER PROVISIONS

Congress enacted ERISA in response to the rapid and substantial increase in employee benefit plans.⁴⁰ Finding that the “operational scope and economic impact of such plans is increasingly interstate[,]” and because of the national interest involved, Congress endeavored to create adequate disclosure and enforcement minimum standards.⁴¹ The resulting remedies, sanctions, and accessibility to courts gave substance to ERISA’s declared policy of promoting and securing employees’ interests.⁴² Congress structured ERISA’s civil enforcement mechanism to give several different kinds of plaintiffs standing to bring an action on behalf of plan participants.⁴³ Furthermore, “ERISA also expanded the

³⁸ Compare *Anderson*, 11 F.3d at 1315, and *Hashimoto*, 999 F.2d at 411, with *Edwards*, 610 F.3d at 223, and *King*, 337 F.3d 427.

³⁹ See *Nicolaou*, 402 F.3d at 330.

⁴⁰ 29 U.S.C. § 1001(a) (2006).

⁴¹ *Id.*

⁴² Richard Rouco, *Available Remedies Under ERISA Section 502(a)*, 45 ALA. L. REV. 631, 632 (1994).

⁴³ *Id.*

class of potential defendants by liberally defining the status of plan fiduciary. Such an expansion sent a clear signal that Congress would no longer tolerate the fraudulent practices that characterized much of pre-ERISA employee benefit law.”⁴⁴

Section 510 of ERISA prohibits employers both from discriminating against an employee based on eligibility for benefits and also from retaliating against an employee who asserts rights under ERISA.⁴⁵

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] this title . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan [or] this title[.] It shall be unlawful for any person to discharge, fine, suspend, expel or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act[.]⁴⁶

For a comprehensive analysis of section 510’s antiretaliation provision, it is useful to compare its language with that of analogous whistleblower provisions contained in previously enacted and interpreted legislation. In particular, this Comment examines section 215 of the FLSA⁴⁷ and section 704(a) of Title VII of the Civil Rights Act of 1964.⁴⁸

The FLSA, an important component of President Roosevelt’s New Deal program, provides for a nationwide minimum wage and an overtime premium in the private market.⁴⁹ Section 215 of this Act prohibits employer retaliation in response to employees asserting their rights to minimum wage and hour standards in the workplace.⁵⁰ It prohibits the “discharge or in any other manner [the] discriminat[ion] against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or relating to

⁴⁴ *Id.*

⁴⁵ Jared Goldstein, *Employment Discrimination Claims Under ERISA Section 510: Should Courts Require Exhaustion of Arbitral and Plan Remedies?*, 93 MICH. L. REV. 193, 194 (1994).

⁴⁶ 29 U.S.C. § 1140 (2006).

⁴⁷ Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2006).

⁴⁸ Civil Rights Act, 42 U.S.C. § 2000e-3 (2006).

⁴⁹ Cynthia Estlund, *Rebuilding the Law of The Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 328 (2005).

⁵⁰ 29 U.S.C. § 202(a) (2006).

this Act . . . or has testified or is about to testify in any such proceeding[.]”⁵¹

The Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, religion, sex, or national origin. Title VII of the Act specifically prohibits employer retaliation against an employee who asserts his or her rights by alleging discrimination by the employer on the basis of the employee’s race, color, religion, sex, national origin, age, or disability.⁵² This section deems it an unlawful employment practice for an employer to “discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this subchapter.”⁵³

Courts and scholars compare section 510 of ERISA to both of the whistleblower provisions described above.⁵⁴ In particular, courts acknowledge the difference in the language used by Congress in the three legislative acts, and interpret this to signify varying objectives and intentions.⁵⁵ As such, in the absence of an explicit Supreme Court holding regarding section 510’s application to unsolicited internal complaints, courts’ various interpretations of the FLSA and Title VII provide useful guidance.

III. CURRENT JUDICIAL APPLICATIONS OF SECTION 510 TO UNSOLICITED INTERNAL COMPLAINTS

Courts struggle with the application of section 510 to cases in which an aggrieved employee makes a complaint within the company

⁵¹ 29 U.S.C. § 215 (2006).

⁵² 42 U.S.C. § 2000e-16a (2006).

⁵³ 42 U.S.C. § 2000e-3(a) (2006).

⁵⁴ See *Gavalik v. Cont’l Can Co.*, 812 F.2d 834, 847 (3d Cir. 1987) (agreeing with Judge Sarokin’s majority opinion in *McLendon v. Cont’l Grp., Inc.*, 602 F.Supp. 1492, 1503–04 (D.N.J. 1985), that just as Title VII prohibits discrimination in the workplace on the basis of one’s race, so too does ERISA’s section 510 prohibit discrimination in the workplace with respect to pension benefits on the basis of one’s proximity to obtaining such benefits); see also *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 223 (3d Cir. 2010); *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 327–28 (2d Cir. 2005) (comparing section 510 of ERISA with section 215 of the FLSA, and Title VII of the Civil Rights Act); *King v. Marriot Int’l, Inc.*, 337 F.3d 421, 427 (4th Cir. 2003) (applying its interpretation in *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 364 (4th Cir. 2000) (holding that section 215 of the FLSA is more narrow than that of Title VII of the Civil Rights Act of 1964 because of the use of words such as “proceeding,” “testify” and “institute”).

⁵⁵ See *King*, 337 F.3d at 427; see also *Nicolaou*, 402 F.3d at 327–28; see also *Edwards*, 610 F.3d at 223–25.

alleging violations of the ERISA statute.⁵⁶ The current circuit split highlights the disparity between purposive and textual approaches to statutory interpretation—the Fifth and Ninth Circuits fall in the former category, and the Third and Fourth Circuits fall in the latter. The Second Circuit takes a slightly different approach, affording protection to internal complaints that are solicited, but not to those that are unsolicited. “Textualism posits that courts are bound by a statute’s plain meaning, and that consideration of legislative history, spirit, or purpose is inappropriate in attempting to discern statutory meaning.”⁵⁷ On the other hand, under the purposivist approach courts read statutory language in the context of the statute’s often-unarticulated purposes.⁵⁸ Thus, it is possible “for some source, such as legislative history or apparent spirit or purpose, to trump the statutory text[.]”⁵⁹ Utilizing these approaches in the context of section 510, the variation hinges on the meaning of the words “inquiry or proceeding.” The former two circuits look to the legislative intent and read the language as encompassing all internal complaints, while the latter two circuits apply a strict analysis of the literal meaning of the words in the statute—finding that the language of section 510 only includes complaints or information provided during formal administrative or judicial proceedings.

A. Purposive Approach: Unsolicited Internal Complaints are Protected Under Section 510 of ERISA Because of Public Policy Justifications

Both the Fifth and the Ninth Circuits have held that section 510’s protection against improper terminations due to reporting ERISA violations—either potential or actual—encompasses unsolicited internal complaints. The Ninth Circuit found that public policy demands protection of such individuals because unsolicited internal complaints are the first step in providing information or testifying about a violation.⁶⁰ Similarly, the Fifth Circuit interpreted section 510 broadly and found that the provision includes unsolicited internal complaints within its ambit.⁶¹

The Ninth Circuit addressed the applicability of section 510 to such internal complaints in *Hashimoto v. Bank of Hawaii*.⁶² In this case, the appellant initially brought an action against her former employer in

⁵⁶ *Edwards*, 610 F.3d at 220–21.

⁵⁷ Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1886 (2008).

⁵⁸ *Id.* at 1898.

⁵⁹ *Id.* at 1898–99.

⁶⁰ *Hashimoto v. Bank of Haw.*, 999 F.2d 408, 411 (9th Cir. 1993).

⁶¹ *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311, 1316 (5th Cir. 1994).

⁶² *Hashimoto*, 999 F.2d at 408.

which she alleged violations of state wrongful discharge law.⁶³ Appellant asserted that she voiced concerns to her supervisors several times between 1989 and 1990 about “potential and/or actual violations by the [b]ank of the reporting and disclosure requirements and fiduciary standards of ERISA.”⁶⁴ In response to her assertions, appellant maintained that the respondent improperly terminated her.⁶⁵

The court found that the case was properly before it⁶⁶ and the appellant had standing⁶⁷ because ERISA is clearly meant to protect whistleblowers.⁶⁸ Furthermore, the court acknowledged that “[t]he normal first step in giving information or testifying in any way that might tempt an employer to discharge one would be to present the problem first to the responsible managers of the ERISA plan.”⁶⁹ If one is subsequently discharged for addressing the problem, then “the process of giving information or testifying is interrupted at its start: the anticipatory discharge discourages the whistle blower before the whistle is blown.”⁷⁰

Similarly, the Fifth Circuit in *Anderson v. Electronic Data Systems Corp.*,⁷¹ interpreted section 510 broadly, concluding that the preemption provision of ERISA is “deliberately expansive . . . [and] is to be construed extremely broadly.”⁷² In this case, the complaint alleged a request by the employer to commit illegal acts, plaintiff’s refusal to do so, plaintiff’s reporting of such requests to management, and his subsequent termination.⁷³ While not explicitly relying on *Hashimoto*, the

⁶³ An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee’s compensation, terms, conditions, location or privileges of employment because: (1) [t]he employee, or a person acting on behalf of the employee, reports or is about to report to a public body, verbally or in writing, a violation or a suspected violation of a law or rule adopted pursuant to law of this [s]tate, a political subdivision of this [s]tate, or the United States, unless the employee knows that the report is false[.]

Id. at 409 (citing Hawaii Whistleblowers’ Protection Act, H.R.S. § 378-62 (2002)).

⁶⁴ *Id.* at 409.

⁶⁵ *Id.*

⁶⁶ *Id.* at 410. The Ninth Circuit found that, regardless of the well-pleaded complaint rule, ERISA completely preempts pension plans such as the one involved in this case. Therefore, despite the appellant’s reliance on state law, the controlling law here is ERISA.

⁶⁷ *McClendon v. Hewlett-Packard Co.*, No. CV-05-087-S-BLW, 2005 U.S. Dist. LEXIS 43579, at *14 (D. Idaho June 9, 2005) (“The Ninth Circuit could not have concluded that ERISA preemption applied without the determination that the former employee was qualified to assert ERISA participation protection.”).

⁶⁸ *Hashimoto v. Bank of Haw.*, 999 F.2d 408, 411 (9th Cir. 1993).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ 11 F.3d 1311 (5th Cir. 1994).

⁷² *Id.* at 1316 (citation and internal quotations omitted).

⁷³ *Id.* at 1312–13.

Fifth Circuit employed similar reasoning. The court looked to Supreme Court precedent, which has “consistently emphasized the expansiveness of the ‘relate to’ standard.”⁷⁴ The “relate to” standard applies to the interpretation of section 502,⁷⁵ which preempts state laws that relate to an ERISA benefit plan. In *Ingersoll-Rand Co. v. McClendon*, the United States Supreme Court reversed the Texas Supreme Court’s holding that “a plaintiff could recover in a wrongful discharge action if he established that the principal reason for his termination was the employer’s desire to avoid contributing to or paying benefits under the employee’s pension fund.”⁷⁶ Instead, the Supreme Court interpreted the complete preemption provision broadly, finding that a state law relates to an ERISA plan “if it has a connection with or reference to such a plan.”⁷⁷ Therefore, the court in *Anderson* reasoned that section 510 likewise deserves a broad interpretation encompassing unsolicited internal complaints made by employees.

Neither circuit undertook a detailed analysis of the literal meaning of the text in the statute; instead, the courts embraced an interpretation in light of the legislative history and public policy considerations. Subsequently, lower courts have followed and applied the reasoning of both the Ninth and Fifth Circuits. The United States District Court for the District of Idaho applied *Hashimoto* and concluded that “an employee can invoke [section 510] by simply presenting the ERISA problem first to the responsible managers of the ERISA plan.”⁷⁸ Similarly, the District Court for the Eastern District of Michigan held that “the activity protected under [s]ection 510 includes internal complaints made by an employee.”⁷⁹ Following this reasoning, section 510’s antiretaliation provision affords protection to an employee who presents unsolicited complaints to management. Likewise, in its analysis of the case law on point, the District Court in the Northern District of Ohio summed up the Fifth Circuit’s holding in *Anderson*: “‘Reporting [ERISA] violations to management[]’ would qualify a person for the

⁷⁴ *Id.* at 1316 (citation omitted).

⁷⁵ Codified at 29 U.S.C.S. § 1144(a), this provision is referred to as “section 502” because it fell within part five, section 502 of the act in its original form. *See supra* note 46.

⁷⁶ *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 136 (1990) (internal citations omitted).

⁷⁷ *Id.* at 139 (internal citations omitted).

⁷⁸ *See Momchilov v. McIlvaine Trucking, Int’l, Inc.*, No. 5:09CV1322, 2010 U.S. Dist. LEXIS 27620, at *15 (N.D. Ohio Mar. 24, 2010) (citing *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311, 1314 (5th Cir. 1994)).

⁷⁹ *Dunn v. Elco Enters., Inc.*, No. 05-71801, 2006 U.S. Dist. LEXIS 26169, at *14 (E.D. Mich. May 4, 2006); *see also Momchilov*, 2010 U.S. Dist. LEXIS 27620, at *14–15.

protections granted under ERISA [section] 510.”⁸⁰ In choosing to follow the interpretation of the Fifth Circuit, the court held that section 510 of ERISA protects unsolicited internal complaints made by an employee to management.⁸¹

B. Textual Approach: Unsolicited Internal Complaints are not Protected Under Section 510 of ERISA Because they are not Compatible with the Literal Meaning of the Text

Addressing the status of unsolicited internal complaints and their protection under section 510, the Fourth and Third Circuits have found that principles of statutory interpretation demand that the words “inquiry or proceeding” be afforded their literal meaning.⁸² This requires a formal administrative or judicial proceeding before the statute’s protections attach.⁸³ The Fourth Circuit has held that use of the phrase “testified or is about to testify” in section 510 suggests that “inquiry or proceeding” is limited to “legal or administrative, or at least to something more formal than written or oral complaints made to a supervisor.”⁸⁴ Similarly, the Third Circuit has recently interpreted section 510 narrowly, finding that internal complaints are not protected.⁸⁵

The Fourth Circuit first addressed the application of section 510 to unsolicited internal complaints in *King v. Marriot International, Inc.*⁸⁶ King was an employee in Marriott’s benefits department, and the controversy involved a proposal to transfer millions of dollars from Marriott’s medical plan to its general corporate reserves account.⁸⁷ King doubted the appropriateness—and legality under ERISA—of the transfer and expressed her concerns to the Senior Vice President of Compensation and Benefits and to other coworkers.⁸⁸ Marriott International subsequently terminated King after she objected to the

⁸⁰ *Momchilov*, 2010 U.S. Dist. LEXIS 27620, at *15 (internal citation omitted); *see also Dunn*, 2006 U.S. Dist. LEXIS 26169, at *11.

⁸¹ *Dunn*, 2006 U.S. Dist. LEXIS 26169, at *14.

⁸² *See King v. Marriot Int’l*, 337 F.3d 421, 427 (4th Cir. 2003); *see also Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 221 (3d Cir. 2010).

⁸³ Section 510 states that: “[i]t shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this [Act].” 29 U.S.C. § 1140 (2006).

⁸⁴ *King*, 337 F.3d at 427.

⁸⁵ *Edwards*, 610 F.3d at 225–26.

⁸⁶ *King*, 337 F.3d at 421. King initiated her action in state court where she alleged a violation of Maryland state law as well as ERISA. The defendants removed the case to federal court due to complete preemption by ERISA, and the appellant appealed the decision of complete preemption. *Id.* at 422–23.

⁸⁷ *Id.* at 423.

⁸⁸ *Id.*

proposed transfer of funds for the third time. Her termination was purportedly due to her continuing feud with a coworker, which “hindered the operation of the benefits department.”⁸⁹

The court focused its discussion of section 510 on the meaning of the phrase “inquiry or proceeding.”⁹⁰ The Fourth Circuit also considered similar antiretaliation provisions under the FLSA and Title VII.⁹¹ It determined that “the use of the phrase ‘testified or is about to testify’ does suggest that the phrase ‘inquir[ies] or proceeding[s]’ referenced in section 510 is limited to the legal or administrative, or at least to something more formal than written or oral complaints made to a supervisor.”⁹² Furthermore, the court found that “the phrase ‘given information’ ensures that even the non-testimonial information (such as incriminating documents) in any inquiry or proceeding would also be covered.”⁹³ Consequently, the court expressly disagreed with *Anderson* and *Hashimoto* in reaching its conclusion that the protections of section 510 do not extend to such unsolicited, internal complaints.⁹⁴

Following similar reasoning, the Third Circuit recently entered the fray with its decision in *Edwards v. A.H. Cornell & Son, Inc.* The Third Circuit agreed with the *King* court and held that “unsolicited internal complaints are not protected under [s]ection 510 of ERISA, 29 U.S.C. § 1140.”⁹⁵ A.H. Cornell hired Edwards as Director of Human Resources.⁹⁶ His duties involved oversight of the company’s group health insurance plan, governed by ERISA, in which he was also a participant.⁹⁷ When Edwards discovered that A.H. Cornell was engaged in several ERISA violations, she complained about them to management; shortly after, the company terminated her.⁹⁸

The court began its discussion by acknowledging the circuit split regarding whether section 510 protects unsolicited internal complaints. Next, it proceeded with statutory interpretation because “‘absent a clearly expressed legislative intention to the contrary, [statutory] language must

⁸⁹ *Id.*

⁹⁰ *Id.* at 427.

⁹¹ *Id.*

⁹² *King*, 337 F.3d at 427 (internal italics omitted); *see also* 29 U.S.C. § 1140 (“[i]t shall be unlawful for any person to discharge, fine, suspend, expel or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act[.]”).

⁹³ *Id.* at 427.

⁹⁴ *Id.* at 428.

⁹⁵ *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 225 (3d Cir. 2010) (emphasis removed).

⁹⁶ *Id.* at 218.

⁹⁷ *Id.*

⁹⁸ *Id.*

ordinarily be regarded as conclusive.”⁹⁹ The court concluded—as did the Fourth Circuit in *King*—that the use of the phrase “testified or is about to testify” implies that the phrase “inquiry or proceeding” is to be limited to more formal actions.¹⁰⁰ The court found that “[i]n drafting [section 510], Congress could have used broad language similar to that present in the anti-retaliation provision in [Title VII].”¹⁰¹ Because Congress declined to utilize such language, a narrow reading was appropriate.¹⁰² The Secretary of Labor, as *amicus curiae*, recommended that section 510 of ERISA be given a broader reading because failure to protect internal complaints would “undermine the provision’s purpose, as ‘it would permit an employer to terminate an employee upon the employee first notifying the employer of the ERISA violation[.]’”¹⁰³ The Third Circuit declined to give deference to the Secretary of Labor’s *amicus* brief because the Secretary “has not pointed to any regulations, rulings, or other material in support of its position[.]” and therefore, “we do not apply *Chevron* deference to ‘agency litigat[ion] positions that are wholly unsupported by regulations, ruling, or administrative practice[.]’”¹⁰⁴

The Third Circuit’s interpretation of agency deference is questionable at best. While the Secretary pointed to no specific regulation,¹⁰⁵ the Secretary stressed that the agency’s practice depends upon a broad reading of the whistleblower provisions’ protections.¹⁰⁶ It is true that deference is not due when the agency’s position is unsupported by regulations, rulings, or administrative practice;¹⁰⁷ but here, the Secretary clearly pointed to relevant administrative practices. As the Supreme Court held in *Chevron*, “a court may not substitute its

⁹⁹ *Id.* at 222 (internal citation omitted).

¹⁰⁰ *Id.* at 223.

¹⁰¹ *Edwards*, 610 F.3d at 223.

¹⁰² *Id.*

¹⁰³ *Id.* at 224 (quoting Appellant Brief ¶ 14, *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 224 (2010)).

¹⁰⁴ *Id.* at 225 (emphasis in original) (citation omitted). The court’s reference to *Chevron* deference relates to the Supreme Court’s decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* (holding that where Congress implicitly grants legislative delegation to an agency, the court shall not disturb the agency’s interpretation of a statutory provision). *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

¹⁰⁵ *Edwards*, 610 F.3d at 225.

¹⁰⁶ Brief for the Secretary of Labor as *Amicus Curiae* in Supp. of Appellant for Reversal 30–31, *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217 (3d Cir. 2010).

¹⁰⁷ *Edwards*, 610 F.3d at 225 (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)).

own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”¹⁰⁸

C. A Third Approach: While Unsolicited Internal Complaints are Unprotected Under Section 510, Solicited Internal Complaints Find Shelter Within the Provision.

With its decision in *Nicolaou v. Horizon Media, Inc.* in 2005, the Second Circuit entered the debate.¹⁰⁹ Horizon hired Nicolaou as the Director of Human Resources and Administration in July 1998.¹¹⁰ In her capacity as the fiduciary and trustee, she oversaw the implementation of Horizon’s 401(k) employee benefits plan as regulated by ERISA.¹¹¹ She was also a plan participant.¹¹² Shortly after her employment began, Nicolaou discovered “a serious payroll discrepancy involving underpayment of overtime to all non-exempt employees of the New York City and Los Angeles offices.”¹¹³ Because of the length of time that the discrepancy had persisted, the complaint alleged that it was “a historical under funding of Horizon’s 401(k) plan.”¹¹⁴

Upon notification of the problem, Horizon’s Chief Financial Officer, Jerry Riley, advised Nicolaou to disregard the matter.¹¹⁵ Nicolaou also raised the issue with Horizon’s Controller on two occasions and encountered the same indifference.¹¹⁶ Convinced that Horizon refused to rectify the discrepancy, Nicolaou brought it to the attention of Mark Silverman, Horizon’s general counsel. Mr. Silverman conducted his own investigation and subsequently verified Nicolaou’s findings.¹¹⁷

At a meeting in November of 1999, Nicolaou and Silverman informed Horizon’s President, William Koenigsberg, of the payroll problem.¹¹⁸ Koenigsberg appeared “disturbed . . . and not at all pleased that this issue was being brought to his attention.”¹¹⁹ Within days of this meeting with Koenigsberg, the company first replaced Nicolaou’s

¹⁰⁸ *Chevron*, 467 U.S. at 844.

¹⁰⁹ *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325 (2d Cir. 2005).

¹¹⁰ *Id.* at 326.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* (internal quotations omitted).

¹¹⁴ *Id.* at 326 (internal citations omitted).

¹¹⁵ *Nicolaou*, 401 F.3d at 326.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* (internal citations omitted).

Human Resources position with another employee and then terminated Nicolaou.¹²⁰

In its discussion, the Second Circuit compared section 510 of ERISA to the analogous whistleblower provisions of the FLSA and Title VII.¹²¹ It found that the antiretaliation provision of ERISA is “unambiguously broader in scope than [s]ection 15(a)(3) of FLSA.”¹²² First, the Second Circuit—in comparing the language of both the FLSA¹²³ and ERISA¹²⁴ whistleblower provisions—agreed with the Secretary of Labor that “whatever level of formality is implied by the term “proceeding” in FLSA, the use of the somewhat less formal term “inquiry” in ERISA is indicative of an intent ‘to ensure protection for those involved in the informal gathering of information.’”¹²⁵ Thus, the term “inquiry” is broad enough to include any request for information.¹²⁶ The court held that the lower court erred in its decision that Nicolaou’s allegations do not fall within the meaning of the term “inquiry or proceeding” as a matter of law.¹²⁷ While the meeting with Koenigsberg was “something less than a formal proceeding,” it was sufficient to constitute an inquiry under section 510, as long as Nicolaou could show she was solicited for the meeting.¹²⁸

In so holding, the Second Circuit did not find its conclusion to be in conflict with *King*, which held that “inquiry or proceeding” as used in section 510 applies only to “the legal or administrative, or at least . . . something more formal than written or oral complaints made to a supervisor.”¹²⁹ The Court in *Nicolaou* believed that the “proper focus is not on the formality or informality of the circumstances under which an individual gives information, but rather on whether the circumstances

¹²⁰ *Id.* at 326–27.

¹²¹ *Nicolaou*, 402 F.3d at 327–28.

¹²² *Id.* at 328 (emphasis removed).

¹²³ [T]o discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any *proceeding* under or related to this Act . . . or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. § 215(a)(3) (2011) (emphasis added).

¹²⁴ “It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any *inquiry or proceeding* relating to this Act[.]” 29 U.S.C. § 1140 (2010) (emphasis added).

¹²⁵ *Nicolaou*, 402 F.3d at 328–29 (quoting Brief for the Secretary of Labor as Amicus Curiae 18, *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325 (2d Cir. 2005)).

¹²⁶ *Id.* at 329.

¹²⁷ *Id.* at 330.

¹²⁸ *Id.*

¹²⁹ *Id.* (quoting *King v. Marriott Int’l, Inc.*, 337 F.3d 421, 427 (4th Cir. 2003)).

can fairly be deemed to constitute an ‘inquiry.’”¹³⁰ The court rejected the Fourth Circuit’s blanket denial of all section 510 protection, unless in the presence of a formal legal or administrative proceeding.¹³¹ Instead, the Second Circuit determined that if the employer affirmatively seeks information regarding a statutory violation, and the employee responds to such a request, then the employee’s response is protected under section 510.¹³² Despite declining to extend this conclusion to unsolicited internal complaints, the Second Circuit did not see its decision as conflicting with the holding in *King*.¹³³

The Second Circuit’s line of reasoning develops a third branch in the circuit split. Much disagreement has resulted over how to interpret the Second Circuit’s holding in *Nicolaou*. The Third Circuit undoubtedly viewed the Second Circuit as being in agreement with the Fourth Circuit, regarding the debate over whether section 510 encompasses unsolicited internal complaints.¹³⁴ Both the Eastern and Southern Districts of New York, however, interpreted the Second Circuit’s holding in *Nicolaou* to permit less formal complaints—such as complaints made to management—to constitute an “inquiry” under section 510.¹³⁵

IV. RESOLUTION OF THE CIRCUIT SPLIT: PRESERVING CONGRESSIONAL INTENT AND THE RIGHTS OF EMPLOYEES IN THE WORKPLACE TO MONITOR THE MAINTENANCE OF THEIR PENSION PLANS

Due to the expressed legislative intent, relevant public policy considerations, and the uniqueness of ERISA’s complete preemption provision, the current circuit split should be resolved in favor of allowing protection under section 510 for unsolicited internal complaints. In the midst of an economic recession, can employees approaching their retirement years have security in their knowledge that they have been accumulating wealth through their employer-provided and federally regulated pension plans? As a society, citizens are encouraged to understand the law of the land, to educate themselves, and—if need be—to monitor employer actions ensuring compliance with the law. To punish a proactive employee who properly seeks to ensure compliance with federal laws flagrantly disregards these principles. Particularly in

¹³⁰ *Id.*

¹³¹ *Nicolaou*, 402 F.3d at 330.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 220–22 (3d Cir. 2010).

¹³⁵ *Higueros v. Catholic Health Plan*, 526 F. Supp. 2d 342, 346 (E.D.N.Y. 2007); *see also Ello v. Singh*, 531 F. Supp. 2d 552, 573 (S.D.N.Y. 2007).

light of ERISA's unique complete preemption provision¹³⁶—which ensures that federal law preempts any dispute encroaching upon the policy behind ERISA—courts should closely monitor the judicial relief available to disgruntled workers in order to ensure uniformity and consistency.

When predicting how the Supreme Court would rule on this circuit split, it is appropriate to examine where the current Justices fall in the textualist/purposivist debate. Justices Scalia and Thomas are self-professed textualists. Chief Justice Roberts, Justice Alito and Justice Kennedy likely also fall in this category.¹³⁷ On the other side of the debate one could expect to find the liberal justices, such as Justices Ginsburg and Breyer, and one would assume the new Justices Sotomayor and Kagan.¹³⁸ While this ideological division suggests that the Court's majority would follow the textualist approach, the positions of Chief Justice Roberts and Justice Alito are debatable.¹³⁹ In various cases,

¹³⁶ 29 U.S.C. § 1144(a) (2006).

¹³⁷ Smith, *supra* note 57, at 14. There are some indications that Justice Alito considers himself a textualist. See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 334–35 (2007) (Alito, J., concurring) (discussing the meaning of “a strong inference” of scienter under Private Securities Litigation Reform Act); see also *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91–92 (2006) (relying on “ordinary meaning” of the statutory text); see also Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 350 (2006) (“When I interpret statutes . . . where I start and often where I end is with the text of the statute.”). Alternatively, there is evidence that he does not consider himself a textualist. For example, he joined Justice Souter's arguably nontextualist partial dissent in *Limtiaco v. Camacho*, 549 U.S. 483, 492 (2007) (Souter, J., concurring in part and dissenting in part) (“If I could not go beyond statutory text . . . a coin toss would be my only way to judgment. But I look to congressional purpose . . .”), and in *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 107 (2007) (Scalia, J., dissenting), he declined to join Justice Scalia's textualist dissent. As for Chief Justice Roberts, it is also unclear whether he considers himself a textualist, see, e.g., Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 319–20 (2005) (indicating some willingness to consider legislative history in certain circumstances), but he generally joins opinions by the Court's textualists, see, e.g., *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224 (2007) (Scalia, J., joined by Roberts, C.J.); *Zuni*, 550 U.S. at 107 (Scalia, J., dissenting, joined by Roberts, C.J.); *Lawrence v. Florida*, 549 U.S. 327, 328 (2007) (Thomas, J., joined by Roberts, C.J.).

¹³⁸ See James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 120 (2008) (classifying Justices Ginsburg and Breyer as liberals for the purposes of their investigation); see also Brandon J. Almas, *From One [Expletive] Policy to the Next: The FCC's Regulation of “Fleeting Expletives” and the Supreme Court's Response*, 63 FED. COMM. L.J. 261, 282 (2010) (acknowledging that while it is assumed that Justices Sotomayor and Kagan will vote liberally—because they replaced liberal Justices Souter and Stevens, respectively—their voting history is not reliable).

¹³⁹ Smith, *supra* note 57, at 14.

Justice Alito has declined to join the textualists.¹⁴⁰ Similarly, in Chief Justice Roberts's confirmation hearing, he stated a willingness to consider legislative history in certain instances.¹⁴¹ Even assuming that Justice Alito and Chief Justice Roberts fall into the textualist group, when evaluating the text of the ERISA statute as a whole and considering how the complete preemption provision effectively eliminates a state law remedy, these Justices could find that the text of the statute supports an inference that all employee complaints should be protected.

A. ERISA's Complete Preemption Provision is Unique in Comparison with the FLSA and Title VII Statutes.

Both FLSA and Title VII have their own enforcement mechanisms, but neither statute calls for complete preemption in the field by the federal courts. The Fair Labor Standards Act permits an aggrieved worker to seek a judicial remedy at the federal, state, or local levels.¹⁴² Furthermore, section 218c(b)(2) of the statute provides that: "[n]othing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement. The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment."¹⁴³

Similarly, Title VII does not preempt state and local laws and regulations regarding workplace discrimination, but rather supplements

¹⁴⁰ See *Limtiaco*, 549 U.S. at 492 (where Justice Alito joined Justice Souter's nontextualist partial dissent); see also *Zuni*, 550 U.S. at 107 (where Justice Alito declined to join Justice Scalia's textualist dissent).

¹⁴¹ See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States *supra* note 137 and accompanying text.

¹⁴² Under 29 U.S.C. § 218(a) (2006) of FLSA, Congress explicitly established: No provision of this chapter or of any order thereunder shall excuse noncompliance with any [f]ederal or [s]tate law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter, and no provision of this chapter relating to the employment of child labor shall justify noncompliance with any [f]ederal or [s]tate law or municipal ordinance establishing a higher standard than the standard established under this chapter. No provision of this chapter shall justify any employer in reducing a wage paid by him, which is in excess of the applicable minimum wage under this chapter, or justify any employer in increasing hours of employment maintained by him, which are shorter than the maximum hours applicable under this chapter.

29 U.S.C. § 218(a).

¹⁴³ 29 U.S.C. § 218c(b)(2) (2006). See *Ervin v. OS Restaurant Services, Inc.*, 632 F.3d 971, 977 (7th Cir. 2010) (finding that the language of § 218(a) effectively preserves state and local regulation).

them.¹⁴⁴ Indeed, section 2000e-7, in discussing the effect of the subchapter on state laws, notes that they maintain their authority.¹⁴⁵ More specifically, Congress explicitly states that it does not seek to preempt state law in the field of discrimination in the workplace on the basis of the employee's race, color, religion, sex, national origin, age or disability.¹⁴⁶

ERISA section 510 is different from the analogous antiretaliation provisions of the FLSA and Title VII because it operates under the doctrine of federal preemption. In practice, this doctrine invalidates all state law claims. As such, if an employee is denied protection under the ERISA whistleblower provision, he or she is prevented from obtaining relief. A state law claim is preempted under ERISA when it "relates to" an ERISA benefit plan.¹⁴⁷ "A 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."¹⁴⁸ Keeping this controlling doctrine in mind emphasizes the dangers of adhering to the textualist approach because narrowly construing the statute would undoubtedly leave many employees without a remedy at federal or state law.

¹⁴⁴ See *Cal. Fed. Sav. and Loan Ass'n v. Guerra*, 758 F.2d 390, 394 (9th Cir. 1985) ("Title VII does not itself prevent [s]tates from extending their nondiscrimination laws to areas not covered by Title VII."); see also *Wymer v. N.Y. State Div. for Youth*, 671 F.Supp. 210, 213 (W.D.N.Y. 1987) (stating that "Title VII was designed to supplement rather than supplant existing laws and institutions relating to employment discrimination.").

¹⁴⁵ The relevant statutory text of 42 U.S.C. § 2000e-7 (2006) is:

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any [s]tate or political subdivision of a [s]tate, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

42 U.S.C. § 2000e-7.

¹⁴⁶ See 42 U.S.C. § 2000h-4 (2006):

Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of [s]tate laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of [s]tate law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

42 U.S.C. § 2000h-4.

¹⁴⁷ *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990) (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983)).

¹⁴⁸ *Id.*

B. Legislative Intent and Public Policy Justifications Demand a Broader Interpretation of Section 510 than that Established in the Third and Fourth Circuits' Jurisprudence.

ERISA is a remedial statute and as such, should be liberally construed in favor of protecting the employee.¹⁴⁹ One of Congress's central objectives in enacting the complex legislation was to promote the interests of employees and their beneficiaries.¹⁵⁰ In addition, Congress included various safeguards for the purpose of deterring abuse and "completely secur[ing] the rights and expectations brought into being by [ERISA.]"¹⁵¹ Specifically, Senate Report 93-127 clearly indicates that the committee added section 510 because of "evidence that in some plans a worker's pension rights or the expectations of those rights were interfered with by the use of economic sanctions or violent reprisals."¹⁵² The Committee concluded that safeguards are "required to preclude this type of abuse from being carried out and in order to completely secure the rights and expectations brought into being by this landmark reform legislation."¹⁵³ With regard to its inclusion of the section 510 safeguards, the Committee's stated intention was "to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities[.]"¹⁵⁴ As such, the antiretaliation provision of ERISA plays a fundamental role in the proper implementation of the entire statutory scheme because it helps to make ERISA's assurances credible.¹⁵⁵ Recognizing the purposes underlying ERISA, it is counterintuitive that Congress would exclude employees who are discharged for bringing an ERISA-related concern to the attention of their manager or supervisor from the protection of the remedial antiretaliation provision.¹⁵⁶ It is also beneficial to employers to have the statute read broadly, as it permits them to rectify any violations before being the subject of a formal administrative investigation or disciplinary actions.

¹⁴⁹ IUE AFL-CIO Pension Fund v. Baker & Williamson, Inc., 788 F.2d 118, 127 (3d Cir. 1986).

¹⁵⁰ *Shaw*, 463 U.S. 85, 90 (1983).

¹⁵¹ *Ingersoll-Rand*, 498 U.S. at 137.

¹⁵² *See supra* note 4, at 35.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 34.

¹⁵⁵ *Inter-Modal Rail Emps. Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 515 (1997).

¹⁵⁶ *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 227 (3d Cir. 2010) (Cowen, J., dissenting).

In addition to recognizing important policy rationales for interpreting section 510 to include unsolicited internal complaints, it is also useful to compare the language of the ERISA antiretaliation provision with analogous whistleblower provisions of other federal statutes. Despite the vast majority of available federal statutes that contain antiretaliation provisions,¹⁵⁷ this Comment compares the whistleblower provisions of the Fair Labor Standards Act¹⁵⁸ and the Civil Rights Act of 1964.¹⁵⁹ These two statutes are appropriate points of comparison because they respectively contain anti-retaliation provisions that are narrower and broader than that within section 510; thus, they offer the opportunity for a more expansive analysis.

The antiretaliation provision that is central to the FLSA prohibits the “discharge or in any other manner [the] discriminat[ion] against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or relating to this Act . . . or has testified or is about to testify in any such proceeding[.]”¹⁶⁰ There is currently a circuit split regarding the protection afforded by this section to internal complaints. The Eighth, Tenth, Eleventh, Sixth, Ninth, First and Fifth Circuits have all held that internal complaints are protected under the whistleblower provision of the FLSA.¹⁶¹ The minority view, adopted by the Second and Fourth Circuits, holds that internal complaints are not protected under section 215.¹⁶² The Seventh Circuit recently interpreted section 215 to protect against retaliation for internal written complaints, but not internal oral complaints.¹⁶³ The United States Supreme Court, however, vacated this decision on March 22, 2011.¹⁶⁴ The Court granted certiorari to resolve a circuit split over whether the

¹⁵⁷ See Sarbanes-Oxley Act, codified in scattered sections of 15 U.S.C., 18 U.S.C. and 28 U.S.C. (2006); Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c) (2006); Clean Water Act, 33 U.S.C. § 1367(a) (2006); American with Disabilities Act of 1990, 42 U.S.C. § 12203 (2006).

¹⁵⁸ 29 U.S.C.S. § 215 (2006).

¹⁵⁹ 42 U.S.C.S. § 2000e-3 (2006).

¹⁶⁰ 29 U.S.C.S. § 215 (2006).

¹⁶¹ See *Brennan v. Maxey’s Yamaha, Inc.*, 513 F.2d 179, 181 (8th Cir. 1975); *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 387 (10th Cir. 1984); *E.E.O.C. v. White & Sons Enters.*, 881 F.2d 1006, 1011–12 (11th Cir. 1989); *EEOC v. Romeo Cmty. Sch.*, 976 F.2d 985, 989 (6th Cir. 1992); *Lambert v. Ackerley*, 180 F.3d 997, 1004 (9th Cir. 1999) (en banc); *Valerio v. Putnam Assocs. Inc.*, 173 F.3d 35, 41 (1st Cir. 1999); *Hagan v. Echostar Satellite, LLC*, 529 F.3d 617, 626 (5th Cir. 2008), *respectively*.

¹⁶² See *Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993) and *Ball v. Memphis Bar-B-Q Co., Inc.*, 228 F.3d 360, 360 (4th Cir. 2000) *respectively*.

¹⁶³ See *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 838, 840 (7th Cir. 2009), *vacated*, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S.Ct. 1325, 1336 (2011).

¹⁶⁴ *Kasten*, 131 S.Ct. at 1325.

phrase “filed a complaint” in section 215, includes oral as well as written complaints.¹⁶⁵ Finding the language of the statute to be ambiguous, the Court relied on “the provision in conjunction with the purpose and context” to conclude that oral complaints are protected within the statutory provision.¹⁶⁶ Despite this clarification, the Court declined to address whether such a complaint must be made to a government agency, or could be made internally to the employer.¹⁶⁷

The FLSA system relies on information and complaints from employees in order to secure compliance rather than requiring detailed and continuous government supervision.¹⁶⁸ Section 215 of the FLSA prohibits an employer from “discharg[ing] or in any other manner discriminat[ing] against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or relating to this Act[.]”¹⁶⁹ The Supreme Court has made clear that “the key to interpreting the anti-retaliation provision is the need to prevent employees’ ‘fear of economic retaliation’ for voicing grievances about substandard conditions.”¹⁷⁰ As such, the FLSA whistleblower provision is among the statutory provisions that have been expansively construed to provide broad protective coverage to internal complainants.¹⁷¹

Consistent with the majority of circuits regarding the FLSA whistleblower provision, Title VII of the Civil Rights Act also extends to internal complaints.¹⁷² The relevant statutory language of Title VII declares it an unlawful employment practice for an employer to “discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this title.”¹⁷³ This language is broad enough to include most employee self-help actions. It declares it unlawful for an employer to discriminate against any employee or applicant for employment because that person “opposed any practice made an unlawful employment

¹⁶⁵ *Id.* at 1330.

¹⁶⁶ *Id.* at 1336.

¹⁶⁷ *Id.*

¹⁶⁸ *Brock v. Richardson*, 812 F.2d 121, 121 (1987).

¹⁶⁹ 29 U.S.C.S. § 215(a)(3) (2006).

¹⁷⁰ *Brock*, 812 F.2d at 124.

¹⁷¹ *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 229–31 (3d Cir. 2010) (Cowan, J., dissenting).

¹⁷² *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 65 (2d Cir. 1992).

¹⁷³ 42 U.S.C.S. § 2000e-3(a) (2006).

practice by this title[.]”¹⁷⁴ In broadly construing the provision’s protections, the term “employees” under section 704(a) extends to former employees,¹⁷⁵ and bars retaliation in response to an employee having filed charges against a former employer.¹⁷⁶

Interpreting a similar antiretaliation provision in the Americans with Disabilities Act, the Second Circuit has found that “Congress sought to protect a wide range of activity in addition to the filing of a formal complaint.”¹⁷⁷ Although referring to the ADA, the Second Circuit relied on the same reasoning to interpret Title VII’s antiretaliation provision because of the similar statutory language.¹⁷⁸ Comparing various federal statutory antiretaliation provisions and their interpretations supports a broader reading of section 510, especially considering the complete preemption doctrine. When enacting the statute, Congress gave private parties a means of enforcing it, but at the same time, subjected its provisions to complete preemption. It would be illogical to deny certain employees protection, leaving them without a remedy.

The Third Circuit, interpreting the Clean Water Act—which contains language similar to that of section 510—concluded that the word “proceeding” is ambiguous because its permissive applications can encompass both formal and informal complaints.¹⁷⁹ In so holding, the court recognized an important public policy consideration that employees should not be discouraged from “pursuing internal remedies before going public with their good faith allegations.”¹⁸⁰ Instead, employees should be encouraged to “notify management of their observations before any formal investigations and litigation are initiated,” thereby providing management with the opportunity to correct, justify, or clarify policies or otherwise “facilitate prompt voluntary remediation and compliance.”¹⁸¹ Imposing a standard that denies protections to employees who report either potential or actual violations of ERISA to management would chill

¹⁷⁴ *Id.*

¹⁷⁵ *See* *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (holding that in order to be more consistent with Title VII’s broad protections, “former employees are included within § 704(a)’s coverage”). This section refers to retaliation in the form of a retaliatory negative reference given to prospective new employers.

¹⁷⁶ *See* *Womack v. Munson*, 619 F.2d 1292, 1294–95 (8th Cir. 1980) (alleging that the county prosecutor terminated plaintiff in retaliation for his discrimination charges against his former employer sheriff).

¹⁷⁷ *Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564, 1569 (2d Cir. 1989).

¹⁷⁸ *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 65 (2d Cir. 1992).

¹⁷⁹ *Passaic Valley Sewage Comm’rs v. U.S. Dep’t of Labor*, 992 F.2d 474, 478 (3d Cir. 1993).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 478–79.

employee initiatives in recognizing “discrepancies in the workings of their agency.”¹⁸²

The language used in section 510 of ERISA is similarly ambiguous. The provision prohibits any person from “discharg[ing], fin[ing], suspend[ing], expel[ing], disciplin[ing], or discriminat[ing] against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act[.]”¹⁸³ As the Committee on Labor and Public Welfare concluded: “the safeguarding effect of the fiduciary responsibility section [of ERISA] will operate efficiently only if fiduciaries are aware that the details of their dealings will be open to inspection, and that individual participants and beneficiaries will be armed with enough information to enforce their own rights[.]”¹⁸⁴ In light of this purpose and important public policy considerations, the interpretation of section 510 by the Fifth and Ninth Circuits must be followed. Subsequently, as the conflicting holdings of the circuits have resulted in a nonuniform application of federal law, there is a compelling reason for the Supreme Court to correct the conflict.

The Fifth Circuit has recognized section 510’s broad prohibition of the termination or otherwise adverse treatment of employees who exercise their ERISA rights or give information or testimony relating to ERISA.¹⁸⁵ Likewise, the Ninth Circuit has held that section 510, “is clearly meant to protect whistle blowers.”¹⁸⁶ These circuits recognize the ambiguity of the language used in section 510, and as a proper step in statutory interpretation, they next turn to legislative intent. Support for a broad reading of section 510 can be found in the Senate Report from the Committee on Labor and Public Welfare.¹⁸⁷

Alternatively, the Fourth Circuit’s finding that section 510’s use of the words “inquiry or proceeding” connotes a narrow interpretation¹⁸⁸ and fails to afford the protection to employees that the Committee had in mind. The Fourth Circuit also draws a parallel between the use of the phrase “testified or is about to testify” to suggest that the language “inquiry or proceeding” is limited to the legal or administrative realm and that mere written or oral complaints to a manager are not within its ambit.¹⁸⁹ The Fourth Circuit stands alone in this proposition, as even the

¹⁸² *Id.* at 479.

¹⁸³ 29 U.S.C.S. § 1140 (2006).

¹⁸⁴ *See supra* note 4, at 27.

¹⁸⁵ *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311, 1315 (5th Cir. 1994).

¹⁸⁶ *Hashimoto v. Bank of Haw.*, 999 F.2d 408, 411 (9th Cir. 1993).

¹⁸⁷ *See supra* note 4 and accompanying text.

¹⁸⁸ *King v. Marriot Int’l, Inc.*, 337 F.3d 421, 427 (4th Cir. 2003).

¹⁸⁹ *Id.* at 428.

Second Circuit—which relied heavily on the Fourth Circuit precedent in its interpretation of section 510—refuses to draw the same parallel.¹⁹⁰ It is unquestionable that the language in section 510 is broader in scope than that of section 215 of the FLSA. Section 510 uses the phrase “given information or has testified or is about to testify in any inquiry or proceeding[.]”¹⁹¹ while section 215 uses the phrase “filed any complaint or instituted or caused to be instituted any proceeding[.]”¹⁹² Filing a complaint or instituting a proceeding are narrower courses of conduct than merely giving information.

The Second Circuit, in finding that solicited internal complaints are protected, determined that “proceeding” refers to the progression of a lawsuit in an official and formal capacity, while “inquiry” refers broadly to any request for information.¹⁹³ This interpretation, however, is unworkable in some circumstances. For instance, where would one draw the line between an unprotected initial step and a protected inquiry? Judge Cowen addressed this question in his dissenting opinion in *Edwards*:

[S]uppose an employee like Edwards complains to her superior, the superior asks some follow-up questions, and the employee responds to these questions. Are the informal responses to some impromptu questions to be regarded as protected because they evidently were made as part of an “inquiry?” In turn, why should such responses be protected while, at the same time, an employer is essentially permitted (and perhaps, in essence, encouraged) to fire an employee immediately after she makes an informal complaint instead of conducting an investigation of some sort?¹⁹⁴

Such a result is unworkable and clearly arbitrary.

¹⁹⁰ *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 330 n. 3 (2d Cir. 2005) stating: Although we agree with the Fourth Circuit that [s]ection 510 protects those who engaged in ‘something more formal than written or oral complaints made to a supervisor,’ we disagree that Congress’s use of the phrase ‘testify or about to testify’ dictates that result. As we read the statutory text, the reference to testimony is wholly irrelevant to our understanding of the language ‘given information . . . in any inquiry or proceeding,’ which is at issue in this case. Our interpretation of [s]ection 510 is based on the respective meanings of the terms ‘inquiry’ and ‘proceeding,’ not the juxtaposition of those terms with reference to testimony.

Id.

¹⁹¹ 29 U.S.C.S. § 1140 (2006).

¹⁹² 29 U.S.C.S. § 215(a)(3) (2006).

¹⁹³ *Nicolaou*, 402 F.3d at 329.

¹⁹⁴ *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 228 (3d Cir. 2010) (Cowen, J., dissenting).

It appears that the circuit split in this instance is motivated by the courts' prior holdings regarding the whistleblower provision in the FLSA.¹⁹⁵ The majority of circuits hold that unsolicited internal complaints are protected under the FLSA, and the same result will likely ensue regarding ERISA's whistleblower provision once more circuits are exposed to the conflict. Statutory interpretation requires that when the language used by the legislature is ambiguous—which is clearly the case with respect to section 510—courts should look to the legislative intent underlying the Act. As expressed in the Senate Report predating ERISA's enactment, scholarly articles, and the Secretary of Labor's interpretation, section 510 was enacted to protect employees and to proscribe interference with the attainment of their rights.¹⁹⁶ As such, to promote compliance with the law and to give employers the opportunity to correct potential deficiencies in their enforcement of ERISA, the courts should not silence employees who are exposed to actual or potential violations.

V. CONCLUSION

The unprecedented reliance of nearly 124 million¹⁹⁷ American laborers on their retirement plans demands consistency and uniformity in regulation. Congress enacted ERISA in response to the rapid growth in plan participants, the need to confront noncompliance by employers, and the resulting underfunding of employee benefit plans.¹⁹⁸ ERISA demands that employers adhere to reporting and disclosure rules and consequently endows the Secretary of Labor with the authority to ensure

¹⁹⁵ A pattern has emerged in which courts that have found internal complaints to be protected under the FLSA have made similar findings with respect to ERISA section 510. Compare *Hagan v. Echostar Satellite, LLC*, 529 F.3d 617, 626 (5th Cir. 2008) (holding that internal complaints are protected under the FLSA) and *Lambert v. Ackerley*, 180 F.3d 997, 1004 (9th Cir. 1999) (en banc) (holding that internal complaints are protected under the FLSA) and *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311, 1315 (5th Cir. 1994) (holding that internal complaints are protected under ERISA); *Hashimoto v. Bank of Haw.*, 999 F.2d 408, 411 (9th Cir. 1993) (holding that internal complaints are protected under ERISA), with *Nicolaou*, 402 F.3d at 330 (holding that internal complaints are not protected under ERISA); *King v. Marriott Int'l Inc.*, 337 F.3d 421, 427–28 (4th Cir. 2003) (holding that internal complaints are not protected under ERISA); *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 364 (4th Cir. 2000) (holding that internal complaints are not protected under the FLSA); *Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993) (holding that internal complaints are not protected under the FLSA). The Third Circuit has not yet ruled on the FLSA issue, but has found that internal complaints are not protected under ERISA. See *Edwards*, 610 F.3d at 225.

¹⁹⁶ See *supra* note 4, at 35; *Rouco*, *supra* note 42, at 632; *Cummins*, *supra* note 1, at 574; *Edwards*, 610 F.3d at 222–23.

¹⁹⁷ See *supra* note 3 and accompanying text.

¹⁹⁸ *Rouco*, *supra* note 42, at 632.

such compliance. It is likely, however, that only those people most interested—the participants themselves—would recognize those clandestine violations. If such employees are threatened with the prospect of wrongful discharge for voicing concerns over violations of the law, they will be silenced and employers will have little incentive to correct such problems.

The current circuit split regarding the application of section 510 of ERISA to unsolicited internal complaints reflects a lack of uniformity. Ironically, a statute that demands complete preemption so as to maintain consistency and uniformity in its application has in practice produced variations in interpretations and a conflict among the circuits. As such, in order to incentivize employer compliance with the terms of ERISA, employees should be free to voice concerns over potential violations without fear of retaliatory discharge. Invoking a broader realm of protection for section 510 would also benefit employers who would be able to address potential or actual violations of ERISA before becoming the subject of formal investigations or disciplinary actions.

A comparison of the text in section 510 with analogous antiretaliation provisions as well as the case law interpreting such other statutes demands an extensive application of protection to plan participants. Similar to the FLSA section 215, section 510 implicates a standard somewhat more formal than mere “opposition” as such word is used in Title VII. Notably, a majority of courts agree that section 215 of the FLSA provides protection for unsolicited internal complaints. Moreover, it is unquestionable that the ERISA anti-retaliation provision is drafted more broadly than that of the FLSA. If section 215 is to be extended to unsolicited internal complaints, so too should section 510.

Further support for such protection of unsolicited internal complaints can be found in the legislative intent and the purpose behind the promulgation of ERISA. Congress, compelled by various incidents of misconduct by employers regarding pension plans, enacted ERISA to provide protection and security to the nation’s laborers.¹⁹⁹ As the Secretary of Labor—the individual given the authority to assure compliance and adherence to the minimum standards set forth to protect private employee benefits plans—expressed as *amicus* in *Edwards*, regarding interpretation of section 510, protection should be extended broadly to employees to effectuate a check on employer compliance.²⁰⁰

With the substandard conditions facing Congress at the time of enactment—specifically, the lack of employer compliance, resulting in

¹⁹⁹ 29 U.S.C. § 1001 (2006).

²⁰⁰ Brief For the Secretary of Labor as Amicus Curiae in Supp. of Appellant for Reversal 30–31, *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217 (3d Cir. 2010).

plan underfunding²⁰¹—as well as public policy concerns that demand protection for the nation’s workers in the wake of their old age, there can be no other appropriate interpretation of section 510 other than one that affords employees protection should they attempt to report an actual or potentially illegal act. The language used by Congress should be afforded its plain meaning; however, where language is ambiguous, Congressional intent should next be considered. In the case of section 510, and the various terms used by Congress in other antiretaliation provisions, the language is quite ambiguous. As such, legislative intent should be considered, and in the case of section 510, Congress intended for its protections to be expansive.²⁰² Furthermore, public policy demands such an inclusive application.

As a nation founded upon a strong incentive to work, employees should be encouraged to monitor their rights in the workplace. It is incomprehensible to permit employer evasion from federal law and to deny protection to the people such evasion harms. Congress, the representatives of the people, could not have intended such a counterintuitive result. Employees providing unsolicited internal complaints to management about actual or potential violations of ERISA should be afforded protection from wrongful discharge in order to effectuate the legislative intent and protect the rights of the nation’s citizens.

²⁰¹ See *supra* note 4, at 9.

²⁰² See *supra* note 4, at 17.