

2014

Reinstating Employer Accountability by Protecting All Forms of Whistleblowing: ERISA Section 510

Roshni Hemlani

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Reinstating Employer Accountability by Protecting All Forms of Whistleblowing: ERISA Section 510

Cover Page Footnote

J.D. Candidate, 2015, Fordham University School of Law; B.A., 2011, New York University. I would like to thank Professor George Conk for guiding me with insightful perspectives and advice. I would also like to thank my family, friends and GindZ for their unwavering encouragement and patience throughout this process

REINSTATING EMPLOYER ACCOUNTABILITY BY PROTECTING ALL FORMS OF WHISTLEBLOWING: ERISA SECTION 510

*Roshni Hemlani**

ABSTRACT

In the United States, employers who have little formal accountability largely manage health and retirement benefits of the working class. Employers face an enormous amount of responsibility to properly manage and protect the health and retirement benefits of their employees and their families. These organizational entities, however, are not subject to similar institutional safeguards as major public pension funds. Thus, Congress enacted the Employment Retirement Income Securities Act to charge employers with fiduciary duties of care over such plans.

However, the remedies for those who breach their duty by mishandling funds or arbitrarily dispensing and denying benefits are quite limited. The federal statute that governs preempts all state remedies and all common law tort actions for bad faith. Thus, disappointed policyholders and beneficiaries are limited only to the remedy of ERISA Section 502. ERISA Section 502 establishes an exclusive civil cause of action, but the federal court's remedy is also quite narrow. Congress's inclusion of Section 510's whistleblowing, anti-retaliation provision acts as an additional safeguard to counter employers' significant lack of transparency and accountability by encouraging employees and pension beneficiaries to bring to light any allegations of fiduciary breach.

Given the limited public oversight of ERISA plans, a more expansive interpretation of ERISA Section 510's whistleblowing provision is particularly important in order to allow it to be an effective, safeguarding mechanism. Despite this, the federal circuits

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have split in Section 510's application to internal, unsolicited complaints.

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INTRODUCTION

There is an unresolved split among seven federal circuit courts on whether employees are protected from employer retaliation for internally reporting unsolicited Employment Retirement Income Security Act¹ complaints.² The cases each circuit has considered have been factually similar—an ERISA benefit plan participant, beneficiary and/or employee administrator was allegedly discharged after complaining about or objecting to an alleged ERISA violation.³ The alleged violations have all involved breaches of fiduciary duty—assertions of impropriety in handling plans as opposed to a breach of a

1. Employee Retirement Income Security Act of 1974, 29 U.S.C. ch. 18 (2012) [hereinafter ERISA].

2. See *infra* Part II.

3. Sexton v. Panel Processing, Inc., 754 F.3d 332, 333-35 (6th Cir. 2014); George v. Junior Achievement of Cent. Ind., Inc., 694 F.3d 812, 813-14 (7th Cir. 2012); 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 (2d Cir. 2005); King v. Marriott Int’l, Inc., 337 F.3d 421, 427 (4th Cir. 2003); Anderson v. Elec. Data Sys. Corp., 11 F.3d 1312, 1312-13 (5th Cir. 1994); Hashimoto v. Bank of Haw., 999 F.2d 408, 409-10 (9th Cir. 1993).

plan itself.⁴ Benefit plan participants and/or beneficiaries have no claim for compensatory or punitive damages, so the legal mechanisms for holding plan administrators accountable to their legal obligations are very limited and narrowed by the Supreme Court's interpretation of the law.⁵ Therefore, whistleblower allegations are a particularly important safeguard in protecting such plans from abuse.⁶

The Fifth, Seventh and Ninth circuits have found that ERISA Section 510⁷ protects an employee's unsolicited internal complaints of ERISA violations.⁸ However, the Second, Third, and Fourth circuits have expressly rejected this position and denied any whistleblower protection to unsolicited internal ERISA complaints under Section 510.⁹ Most recently, the split has gained further traction as the Sixth Circuit Courts of Appeals affirmed constraints of Section 510's whistleblowing provision by also rejecting whistleblower protection for unsolicited internal complaints.¹⁰

This Note aims to analyze the persisting unresolved circuit split regarding the boundaries of Section 510's whistleblowing protection.¹¹ Part I of the Note provides background on ERISA's enactment, key provisions of ERISA accountability safeguards and Section 510's role to protect and promote disclosure. Part II discusses each circuit's position regarding whether Section 510 protects unsolicited internal complaints as well as the interpretive methods employed to reach said determination. Part III explores external persuasive factors including the Department of Labor's position, the inadequacy of uniformed state law remedies and the growing trend of protecting whistleblower disclosure. All of these persuasive factors advocate for Section 510 to protect all

4. *Sexton*, 754 F.3d at 334-35; *George*, 694 F.3d at 813-14; *A.H. Cornell*, 610 F.3d at 219; *Nicolaou*, 402 F.3d at 327; *King*, 337 F.3d at 422-23; *Anderson*, 11 F.3d at 1312; *Hashimoto*, 999 F.2d at 409-10.

5. See Peter K. Stris, *ERISA Remedies, Welfare Benefits and Bad Faith: Losing Sight of the Cathedral*, 26 HOFSTRA L. REV. 387, 395 (2004).

6. See *infra* Part I.C.

7. 29 U.S.C. § 1140 (2012). This Note will refer to ERISA provisions by the section number of ERISA instead of the section number in the United States Code.

8. 29 U.S.C. § 1140; *George*, 694 F.3d at 817; *Anderson*, 11 F.3d at 1315; *Hashimoto*, 999 F.2d at 411.

9. *A.H. Cornell*, 610 F.3d at 223; *Nicolaou*, 402 F.3d at 329; *King*, 337 F.3d at 427.

10. *Sexton v. Panel Processing, Inc.*, 754 F.3d 332, 335 (6th Cir. 2014).

11. 29 U.S.C. § 1140.

forms of whistleblowing, including unsolicited internal complaints. Part IV endorses a broad interpretation of Section 510, mandated either judicially or legislatively, that would keep employers accountable to their fiduciary duties by providing all ERISA whistleblowers the highest and broadest level of protection.

I. BACKGROUND OF ERISA AND ITS FRAMEWORK

In order to determine the most appropriate way to interpret Section 510 to increase employer accountability, it is necessary to first understand the basic framework of ERISA.¹² Part I focuses on the overall intent, purpose and goals of ERISA's enactment.¹³ Specifically, this part examines the development of three ERISA concepts that substantially affect employer accountability: fiduciary duty;¹⁴ civil enforcement;¹⁵ and preemption.¹⁶ Finally, this part details Section 510's whistleblowing and anti-retaliation aspects.¹⁷

A. UNDERSTANDING ERISA

In 1974, Congress recognized that the employee benefit plan sector substantially increased in all aspects (size, scope, and value), but its regulation remained minimal and ineffective.¹⁸ Such benefit plans include "any plan, fund or program . . . established or maintained by an employer" that provides "medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment."¹⁹ Thus, in 1974 Congress enacted the Employee Retirement Income Security Act to "promote the interests of employees and their beneficiaries in employee benefit plans" and "ensure that plans

12. 29 U.S.C. § 1001.

13. *Id.*

14. 29 U.S.C. § 1113.

15. 29 U.S.C. § 1132.

16. 29 U.S.C. § 1144.

17. 29 U.S.C. § 1140.

18. 29 U.S.C. § 1001(a). S. REP. NO. 93-127, at 3 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4839-40.

19. 29 U.S.C. § 1002.

and plan sponsors would be subject to a uniform body of benefits law.”²⁰ Thus, ERISA enactment aimed to standardize the governance of private pension and health care plans across the nation.²¹

ERISA covers pension benefit plans.²² An employee pension plan includes a program or fund, which either “provides retirement income to employees” or establishes “a deferral of income by employees for periods extending to the termination of covered employment or beyond.”²³ ERISA sets minimum standards for most voluntary benefit health plans to protect employees who elect to participate in such plans.²⁴ As a comprehensive federal law, ERISA includes information regarding funding, participation standards and more importantly, the fiduciary duties of those responsible for managing such plans.²⁵

Congress enacted ERISA due to the increasing national public interest in employee benefit plans.²⁶ That interest continues to flourish as the benefit plan sector exhibits tremendous growth—as of October 29, 2013, such welfare plans covered about 141 million American workers, retirees and their families.²⁷ The ERISA plans also have substantial authority and impact upon other non-retirement benefits such as disability insurance, life insurance, severance pay and the provision of health care.²⁸ Employee benefit plans also have a considerable effect

20. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137, 142 (1990) (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983)).

21. *See Health Plans & Benefits*, U.S. DEP’T OF LABOR, <http://www.dol.gov/dol/topic/health-plans/erisa.htm> (last visited Sept. 28, 2013).

22. 29 U.S.C. § 1002; *Retirement Plans, Benefits & Savings*, U.S. DEP’T OF LABOR, <http://www.dol.gov/dol/topic/retirement/typesofplans.htm>. Defined benefit plans allocate a specified monthly benefit amount at retirement, whereas defined contribution plans do not. *Id.* In defined contribution plans, employers or employees, or both, annually contribute a specified rate to the employees’ individual account under the plan. *Id.* (last visited Jan. 8, 2014).

23. 29 U.S.C. § 1002(2)(a)(1)-(2).

24. *Retirement Plans, Benefits & Savings – ERISA*, U.S. DEP’T OF LABOR, <http://www.dol.gov/dol/topic/retirement/erisa.htm> (last visited Feb. 22, 2014).

25. 29 U.S.C. § 1001(a).

26. *Id.*

27. *Fact Sheet: Fiscal Year Agency Results*, U.S. DEP’T. OF LABOR, <http://www.dol.gov/ebsa/newsroom/fsFYagencyresults.html> (last visited Jan. 18, 2014).

28. ERISA-governed welfare plans provide the majority of private health insurance in the United States. For example, as of 2006, 62% (162.7 million) of non-elderly Americans received health insurance from an employer. *See* Sara R. Collins, Chapin White & Jennifer L. Kriss, *Whither Employer-Based Health Insurance?*, THE

on interstate commerce, development of industries, growth of employment opportunities and protection of employees.²⁹ As of October 29, 2013, these plans included assets of over \$7.6 trillion.³⁰ Because such plans receive preferential federal tax treatment, they also have a direct effect on United States revenues.³¹

Most importantly, however, the government drafted ERISA to protect employee pensions.³² ERISA is fundamental in protecting the retirement security of Americans.³³ ERISA is an inclusive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans.³⁴

The Employee Benefits Security Administration (EBSA) is responsible for enforcing ERISA and ensuring the integrity of the private employee benefit plan system.³⁵ With such immense growth comes the need to enforce employer administrator accountability.³⁶ EBSA oversees almost 684,000 retirement plans and approximately 2.4 million health plans.³⁷ In the 2013 fiscal year alone, a total of \$1.69 billion dollars was collected from enforcement, voluntary fiduciary

COMMONWEALTH FUND, 7 fig.1 (Sept. 2007), http://www.commonwealthfund.org/~media/files/publications/issue-brief/2007/sep/whither-employer-based-health-insurance—the-current-and-future-role-of-u-s—companies-in-the-provis/collins_whitheremployer-basedhltins_1059-pdf.pdf. This is important, as Americans with private insurance make the most healthcare expenditures (79% in 2004). See, e.g., Gary Olin, *Medical Expenditures of the Non-Elderly*, MEDICAL EXPENDITURE PANEL SURVEY (Jan. 2008), http://meps.ahrq.gov/data_files/publications/st197/stat197.pdf (discussing the impact of ERISA on medical expenditures).

29. 29 U.S.C. § 1001(a).

30. U.S. DEP'T. OF LABOR, *supra* note 27.

31. 29 U.S.C. § 1001(a).

32. As stated by a Symposium participant, “ERISA was Congress’ attempt to devise a comprehensive regulatory program to protect millions of American workers who looked to private pension plans for financial support in their retirement years.” JAMES A. WOOTEN, *THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, A POLITICAL HISTORY* 51 (2004).

33. ERISA-administered “retirement plans are the single largest source of income [aside from Social Security] for aged Americans. *Id.* at 1-2.

34. See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90, 103 (1983).

35. U.S. DEP'T. OF LABOR, *supra* note 27.

36. See *Frequently Asked Questions*, ERISA FIDUCIARY ADMINISTRATORS, <http://www.erisafiduciaryadministrators.com/index.php/faqs-2/> (last visited Jan. 12, 2014); U.S. DEP'T. OF LABOR, *supra* note 27.

37. U.S. DEP'T. OF LABOR, *supra* note 27.

corrects, and informal complaint resolutions.³⁸ Additionally, in the 2013 fiscal year, EBSA investigations led to the indictment of 88 persons for employment benefit plans crimes.³⁹

B. ERISA ACCOUNTABILITY SAFEGUARDS: FIDUCIARY DUTY, CIVIL ENFORCEMENT & PREEMPTION

It is evident that employer accountability was an underlying principle in the enactment of ERISA when specifically examining the Act's fiduciary duty,⁴⁰ civil enforcement,⁴¹ and preemption safeguards.⁴² This section will first focus on each congressional safeguard individually and discuss their associated developmental trajectories. Then, the section will collectively consider the direct impact of such developments in the context of employer accountability.

1. *Fiduciary Duty*

ERISA requires employers to follow certain fiduciary conduct standards.⁴³ These duties are particularly significant with respect to the level of protection granted by the Act.⁴⁴ In notable cases, the whistleblowing assertions were from alleged impropriety in fiduciaries' handling of plans, rather than breaches of the plans themselves.⁴⁵

Under ERISA, persons who exercise discretionary control or authority over a benefit plan (via management, administration or assets) are automatically fiduciaries.⁴⁶ ERISA requires benefit plans to contain

38. *Id.*

39. *Id.*

40. 29 U.S.C. § 1113.

41. *Id.* § 1132.

42. *Id.* § 1144.

43. *Id.* § 1104.

44. *See id.*

45. *See* *Sexton v. Panel Processing, Inc.*, 754 F.3d 332 (6th Cir. 2014); *George v. Junior Achievement of Cent. Ind., Inc.*, 694 F.3d 812 (7th Cir. 2012); *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 223 (3d Cir. 2010); *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325 (2d Cir. 2005); *King v. Marriott Int'l, Inc.*, 337 F.3d 421, 427 (4th Cir. 2003); *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1312 (5th Cir. 1994); *Hashimoto v. Bank of Haw.*, 999 F.2d 408 (9th Cir. 1993).

46. *See* *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993); *see also* ERISA FIDUCIARY LAW 12-13 (Susan P. Serota & Frederick A. Brodie eds., 2d ed. 2006).

“one or more named fiduciaries who . . . shall have authority to control and manage the operation and administration of the plan.”⁴⁷ The named fiduciary is either named in the documentation of the plan or is identified by the employing entity.⁴⁸ This fiduciary also has the functional responsibility of exercising “discretionary control or authority” of the “plan’s management, administration or assets.”⁴⁹

Fiduciaries must uphold duties pursuant to ERISA Section 404(a).⁵⁰ They may not circumvent or find exemption from these statutorily required responsibilities in any employee benefit plan.⁵¹ Fiduciary action is set to a specific code of conduct.⁵² This principally requires fiduciaries to act “solely in the interest of the [plan’s] participants and beneficiaries.”⁵³ Section 404 requires fiduciaries to provide plan benefits to participants and beneficiaries as well as to defray reasonable expenses in administering the plan.⁵⁴ They must execute their fiduciary actions with great “care, skill, prudence, and diligence under the circumstances” as a “prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.”⁵⁵ The fiduciary also has the responsibility of curtailing risk of losses by diversifying plan investments, unless it is prudent to not do so.⁵⁶ Additionally, the fiduciary must act in accordance with “the documents and instruments governing the plan,” so long as they comply with ERISA provisions.⁵⁷ Ultimately, the proper exercise of fiduciary duty is adjudicated against how someone with expertise in the area would act—a fiduciary is not exempt from Section 404(a)’s duties simply due to their own lack of expertise in an area.⁵⁸ Under Section

47. 29 U.S.C. § 1102(a)(1).

48. 29 U.S.C. § 1102(a)(2).

49. See *Mertens*, 508 U.S. at 262 (1993); see also U.S.C. § 1002(21)(A); ERISA FIDUCIARY LAW, *supra* note 46, at 13.

50. See 29 U.S.C. § 1104(a)(1)(A); ERISA FIDUCIARY LAW, *supra* note 46, at 13.

51. 29 U.S.C. § 1110(a); see PETER J. WIEDENBECK, ERISA: PRINCIPLES OF EMPLOYEE BENEFIT LAW 14, 121 (2010).

52. 29 U.S.C. § 1104.

53. 29 U.S.C. § 1104(a)(1).

54. *Id.* § 1104(a)(1)(A).

55. *Id.* § 1104(a)(1)(B).

56. *Id.* § 1104(a)(1)(C).

57. *Id.* § 1104(a)(1)(D).

58. See, e.g., *Howard v. Shay*, 100 F.3d 1484, 1489-90 (9th Cir. 1996) (holding that attaining independent appraisals does not satisfy fiduciary duty); *Fink v. Nat’l Sav.*

409, fiduciaries that fail to adhere to their fiduciary responsibilities may be held personally liable for losses resulting from said failure.⁵⁹

When it pertains to multiple plan fiduciaries, under Section 405, a fiduciary may be liable for another fiduciary's breach of duty.⁶⁰ Liability may also be established if the fiduciary "participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach."⁶¹ Thus, fiduciaries with actual knowledge have a duty to discontinue providing assistance to violating co-fiduciaries and to divulge said violations.⁶² Failure to take reasonable steps to remedy violations when a fiduciary has knowledge of said violation may also result in liability.⁶³ Although at least one court held constructive knowledge to be sufficient, courts vary in the amount of knowledge required to prompt the obligation to reasonably remedy the violation.⁶⁴ Lastly, fiduciaries may also be liable if failure to fulfill their personal fiduciary duty facilitates a co-fiduciary's breach.⁶⁵ In this instance, a co-fiduciary does not need to possess actual knowledge to be found liable.⁶⁶ Instead, the ability for a co-fiduciary to commit a violation because the fiduciary did not

& Trust Co., 722 F.2d 951, 957 (D.C. Cir. 1985) ("A fiduciary's independent investigation of the merits of a particular investment is at the heart of the prudent person standard."); *Donovan v. Cunningham*, 716 F.2d 1455, 1474 (5th Cir. 1983) (holding that obtainment of expert advice is allowed to fulfill the prudent person standard of Section 404(a)); ERISA FIDUCIARY LAW, *supra* note 46, at 237-38.

59. 29 U.S.C. § 1109(a); *see* ERISA FIDUCIARY LAW, *supra* note 46, at 12, 31.

60. 29 U.S.C. § 1105(a).

61. *Id.* § 1105(a)(1).

62. *See id.*; ERISA FIDUCIARY LAW, *supra* note 46, at 377.

63. 29 U.S.C. § 1105(a)(3).

64. *See, e.g., Silverman v. Mut. Benefit Life Ins. Co.*, 138 F.3d 98, 104 (2d Cir. 1998) (holding that fiduciaries can be held liable on if they have actual knowledge of co-fiduciary breach); *Lee v. Burkhart*, 991 F.2d 1004, 1011 (2d Cir. 1993) (holding a fiduciary must possess actual knowledge that the co-fiduciary breached); *In re Dyngy, Inc. ERISA Litig.*, 309 F. Supp. 2d 861, 905-06 (S.D. Tex. 2004) (holding constructive knowledge as sufficient); *see also* ERISA FIDUCIARY LAW, *supra* note 46, at 377-78.

65. 29 U.S.C. § 1105(a)(2) (stating that a fiduciary is liable for another fiduciary's breach if the failure to comply with Section 404(a) "enabled such other fiduciary to commit a breach").

66. *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 284 F. Supp. 2d 511, 581 (S.D. Tex. 2003); *see* ERISA FIDUCIARY LAW, *supra* note 46, at 378.

appropriately comply with Section 404(a) is enough to find the fiduciary liable.⁶⁷

2. Civil Enforcement of ERISA

Section 510 and the ERISA civil remedies work in conjunction to increase employer accountability.⁶⁸ Whereas Section 510 protects whistleblowers that disclose fiduciary breach from adverse retaliation,⁶⁹ Section 502(a) allows individuals to rectify and redress fiduciary breaches via civil litigation.⁷⁰

Congress's chief purpose for enacting Section 502(a) is to provide those injured by a statutory violation access to a suitable remedy.⁷¹ In addition to mandating administrative review, ERISA also authorizes civil litigation to rectify violations.⁷² Section 502's "civil enforcement scheme . . . is one of the essential tools for accomplishing the stated purposes of ERISA."⁷³ As interpreted by the Supreme Court, Section 502(a) sets forth exclusive remedies available in ERISA civil litigation.⁷⁴ Specifically, subsection (1) to (3) contours the circumstances

67. *In re Enron Corp.*, 284 F. Supp. 2d at 580 (quoting 29 U.S.C. § 1105(a)(2)); see ERISA FIDUCIARY LAW, *supra* note 46, at 378.

68. See 29 U.S.C. § 1132(a).

69. See 29 U.S.C. § 1140.

70. See 29 U.S.C. § 1132.

71. Congress specifically expressed this expectation in describing ERISA as "providing for *appropriate remedies*." *Id.* § 1001 (emphasis added). Additionally, the statute's civil enforcement provisions also implements several usages of the term "appropriate." *Id.* § 1001; *id.* § 1109(a) ("equitable or remedial relief as the court may deem appropriate"); *id.* § 1132(a)(2) ("appropriate relief"); *id.* § 1132(a)(3) ("appropriate equitable relief"). See 29 U.S.C. § 1132(a).

72. See *id.* § 1132(a) (entitled "Civil Enforcement"); see also *id.* § 1001 (entitled "Congressional findings and declaration of policy" and providing that "[i]t is hereby declared to be the policy of this chapter to protect . . . the interest of participants in employee benefit plans and their beneficiaries . . . by providing for . . . ready access to the Federal courts.").

73. See *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52 (1987).

74. *Id.* at 54 ("The deliberate care with which ERISA's civil enforcement remedies were drafted . . . argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive."); *Mass. Mut. Life. Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985) ("The . . . carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted, however, provide strong evidence that

of three separate civil actions by which a participant, beneficiary or fiduciary may enforce ERISA.⁷⁵

First, under Section 502(a)(1)(B), a participant or beneficiary can bring an action for direct enforcement of the plan's benefits, such as the rights of plan or future benefits of the plan.⁷⁶ Participants are likely to use this option if they believe they have been wrongfully denied plan benefits.⁷⁷ Oddly, plaintiffs may file a lawsuit to recover benefits under this subsection, unlike other civil litigation authorized by ERISA, in either federal or state court.⁷⁸ However, only a small fraction of benefit denials actually results in litigation in either federal or state court.⁷⁹

Second, under Section 502(a)(2), a participant, beneficiary, fiduciary or the Secretary of Labor may bring an action against a fiduciary for breach of fiduciary duties as defined in ERISA Section 409.⁸⁰ If pertaining to a defined contribution plan, when the fiduciary's breach damages the assets of an individual account, individual recovery is permissible.⁸¹ However, if pertaining to a defined benefit plan, Section 502(a)(2) limits the relief sought on behalf of the plan, and not the individual.⁸²

Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly" (emphasis added).

75. 29 U.S.C. § 1132(a)(1-3).

76. *Id.* §1132(a)(1)(B); *see also* JAYNE E. ZANGLEIN & SUSAN J. STABILE, *ERISA LITIGATION* 107 (3d ed. 2008).

77. ZANGLEIN & STABILE, *supra* note 76, at 107; John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317, 1334 (2003); *see also* Regina L. Reading, Comment, *Rethinking "The Plan": Why ERISA Section 502(a)(2) Should Allow Recovery to Individual Defined Contribution Pension Plan Accounts*, 56 BUFF. L. REV. 315, 329 (2008).

78. *See* 29 U.S.C. § 1132(e)(1) ("Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction . . .").

79. *See, e.g.*, Susan M. Mangiero, *ERISA Fiduciaries Beware: Risk Is More Than a Four-Letter Word*, 19 PROB. & PROP. 65, 65 (2005) (explaining that according to the Administrative Office of the U.S. Courts, there were 9,167 new ERISA cases in 2000 and 11,499 in 2004).

80. *See* 29 U.S.C. § 1132(a)(2); *see supra* Part I.B.1.

81. *See* 29 U.S.C. § 1132(a)(2).

82. *See* *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985); Susan Harthill, *A Square Peg in a Round Hole: Whether Traditional Trust Law "Make-*

Third, Section 502(a)(3) permits participants, beneficiaries or fiduciaries, *inter alia*, to bring action to “obtain other appropriate equitable relief” to redress violations or enforce provision of the subchapter or the ERISA plan’s terms.⁸³ Although this option is often categorized as a “catch-all provision,”⁸⁴ the Supreme Court’s interpretation has limited an individual’s ability to successfully litigate mishandled ERISA plans.⁸⁵ The Supreme Court continues to develop the precise meaning of “equitable relief” in Section 502(a)(3), but has rejected recovery of extra-contractual or punitive damages by injured litigants.⁸⁶

Thus, the Supreme Court has barred any ERISA recovery of monetary compensation for consequential injuries caused by the improper handling of benefit plans. This rejection is far-reaching because it bars any such recovery under state law as well due to ERISA preemption.

3. ERISA Preemption

Preemption of state law is key to how the Federal Circuits came to interpret Section 510.⁸⁷ The seminal case of each Circuit’s Section 510 interpretation relied upon the finding of ERISA preemption in order to justify the action’s removal to federal jurisdiction and subsequent denial

Whole” Relief is Available Under ERISA Section 502(a)(3), 61 OKLA. L. REV. 721, 738 (2008).

83. 29 U.S.C. § 1132(a)(3)(B).

84. See *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996); ZANGLEIN & STABILE, *supra* note 76, at 110.

85. See, e.g., *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 257 (1993) (rejecting the government’s argument that participants and beneficiaries were entitled to seek compensatory damages under Section 502(a)(3)’s “equitable relief” because, “at common law, the courts of equity had exclusive jurisdiction over virtually all actions by beneficiaries for breach of trust”).

86. See, e.g., *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356, 356 (2006) (recognizing the remedy of equitable lien by contractual agreement as “typically available in equity”). However, the Court continues to deny the categorization of any remedy as equitable to allow recovery of monetary compensation for consequential injuries of ERISA violations.

87. See 29 U.S.C. § 1144.

of Plaintiff's motion to remand to state court.⁸⁸ Preemption is also the sole reason state law causes of actions lose all traction if the court determines an existing ERISA connection.⁸⁹

Under Section 514,⁹⁰ ERISA expressly preempts state laws and deems that it "shall supersede any and all state laws insofar as they may now or hereafter relate to any" benefit plan covered by ERISA.⁹¹ Therefore, ERISA preempts the state law or claim if a state law relates to something within ERISA's scope, albeit indirectly.⁹² ERISA supersedes any state laws related to employment benefit plans covered by ERISA largely due to the standardized, interstate nature of employee benefit plans.⁹³ With the intention that ERISA be "exclusively a federal concern,"⁹⁴ Congress included this preemption to create a uniform structure removed from "conflicting or inconsistent state laws."⁹⁵ However, contrary to Section 514's intention, some courts have had

88. See *infra* Part II. Circuit Split depicts the reoccurring trend of Defendants removing the case to federal court claiming ERISA preemption after the Plaintiffs file retaliation cause of action under state law in state courts. Subsequently, Plaintiffs lose the ability to seek redress under state laws due to ERISA preemption and are therefore are limited to civil remedies. See *supra* Part I.B.2.

89. See generally William Pierron & Paul Fronstin, *ERISA Pre-emption: Implications for Health Reform and Coverage*, ISSUE BRIEF (Emp. Benefit Research Inst., Washington, D.C.), Feb. 2008, at 1, available at http://www.ebri.org/pdf/briefspdf/EBRI_IB_02a-20082.pdf (discussing the effects of ERISA pre-emption on national health coverage).

90. See 29 U.S.C. § 1144.

91. 29 U.S.C. § 1144(a). "State law' includes all laws, decision, rules, regulations, or other State action having the effect of law . . ." See also Richard A. Epstein & Alan O. Sykes, *The Assault on Managed Care: Vicarious Liability, ERISA Preemption, and Class Actions*, 30 J. LEGAL STUD. 625, 631 (2001) ("All courts seem to agree that disputes over the coverage of an employee benefit plan relate to the administration of the plan and thus come within ERISA's general preemption clause.").

92. See *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990).

93. 29 U.S.C. § 1144; S.29 U.S.C. § 1144; S. REP. NO. 93-127, at 29 (1973), reprinted in 1974 U.S.C.C.A.N. 4838, 4865.

94. See *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981).

95. See 120 CONG. REC. 29, 933 (1974) (statement of Sen. Harrison A. Williams, Jr.).

difficulty determining if ERISA preempts state law, and thus, have inevitably created a structure that conflicts from circuit to circuit.⁹⁶

Initially, the Supreme Court interpreted the ERISA preemption clause broadly to hold that a state law “relates to” ERISA if it is in “connection with” or with “reference to” a plan covered by ERISA.⁹⁷ Furthermore, plaintiff’s state law claims, which rely on the existence of or participation in ERISA plans, are also preempted.⁹⁸ Therefore, a state law cause of action that “duplicates, supplements, or supplants” remedies under Section 502(a) is preempted by ERISA because it is considered a federal claim.⁹⁹

Although the Supreme Court recently constricted ERISA’s preemption scope, it is limited to a very specific fact situation.¹⁰⁰ In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, the Supreme Court held that ERISA did not preempt vicarious liability malpractice claims brought against managed care organizations.¹⁰¹ The Court adopted this position based on the “assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”¹⁰² The Court reasoned that the state laws at issue would still allow, rather than impede, the uniformed regulation of employee benefit plans across the states.¹⁰³

96. See, e.g., *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 454 (3d Cir. 2003) (Becker J., concurring) (noting the difficulty lower courts have had with the preemption test).

97. See *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983); see also ZANGLEIN & STABILE, *supra* note 76, at 122.

98. See *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139-40 (1990) (holding that ERISA preempted wrongful discharge state law when the reason for termination discharge was to avoid contributing to the pension fund).

99. See *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209 (2004).

100. See ZANGLEIN & STABILE, *supra* note 76, at 123.

101. *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 649 (1995).

102. *Id.* at 655 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); see also ZANGLEIN & STABILE, *supra* note 76, at 132.

103. *Blue Cross & Blue Shield Plans*, 514 U.S. at 657-58.

4. *Constriction of ERISA Safeguards Ultimately Undermines Employer Accountability*

The narrowing of civil enforcement and ERISA preemption mutually weakens employer accountability of ERISA violations, despite the existence of employer fiduciary duties.¹⁰⁴ The lack of civil remedies such as punitive and consequential damages touched upon earlier¹⁰⁵ is exacerbated when assessed in conjunction with ERISA preemption.¹⁰⁶ Even if a state law cause of action somehow survives Section 514's explicit preemption and it permits consequential or punitive damages, Section 502(a) would also preempt it.¹⁰⁷ The Supreme Court maintains that allowing participants and beneficiaries to obtain supplemental additional remedies under state law would undermine the intention to "creat[e] a comprehensive statute for the regulation of employee benefit plans."¹⁰⁸ However, barring monetary compensation for consequential damages (on both federal and state levels) has removed a plaintiff's financial incentive to pursue legitimate claims until attaining a settlement or judgment.¹⁰⁹ In turn, the financial burden emplaced on plaintiffs culminates in an overall under-enforcement, which eliminates pressure upon fiduciaries and employers to remain accountable.¹¹⁰

In light of the Supreme Court's deference to the administrative decisions of ERISA fiduciaries,¹¹¹ stronger remedies allowing recovery may incentivize fiduciaries to not engage in violations.¹¹² Furthermore, the intent to fashion ERISA as the sole remedy also extends preemption to bar wrongful retaliatory termination state claims if an underlying

104. 29 U.S.C. § 1104.

105. *See supra* Part I.B.2.

106. 29 U.S.C. § 1144.

107. *See* Stris, *supra* note 5, at 395.

108. *See* Aetna Health Inc. v. Davila, 542 U.S. 200, 208 (2004).

109. *See, e.g.,* Mark A. Hall et al., *Judicial Protection of Managed Care Consumers: An Empirical Study of Insurance Coverage Disputes*, 26 SETON HALL L. REV. 1055, 1068 (1996) (noting potential litigants "find it too expensive or too difficult to pursue their objections through the costly and time-consuming judicial process").

110. *See* Stris, *supra* note 5, at 395.

111. *See* John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials Under ERISA*, 101 NW. U. L. REV. 1315, 1321 (2007).

112. Sharon Tennyson & William J. Warfel, *The Law and Economics of First-Party Insurance: Bad Faith Liability*, 16 CONN. INS. L.J. 203, 240 (2008).

ERISA relation exists.¹¹³ In light of these limiting factors, it is particularly important to determine which reading of Section 510, narrow or broad, would hold employer fiduciaries accountable.¹¹⁴

C. THE ANTI-RETALIATION WHISTLEBLOWING ERISA PROVISION:
SECTION 510

1. Section 510: ERISA Anti-Retaliation Provision

In its creation of ERISA, Congress found it necessary to create a framework of adequate safeguards relating to the establishment, operation and administration of employee benefit plans to ensure an unobstructed flow of information between participants and beneficiaries.¹¹⁵ As part of the ERISA system, Congress included “various safeguards to preclude abuse and ‘to completely secure the rights and expectations brought into being by this landmark reform legislation.’”¹¹⁶ The precise safeguard that is the predominant concern of this Note is the anti-retaliation whistleblower protection provision—Section 510.

Section 510’s anti-retaliation provisions directly correlate to ERISA’s goal of setting a fiduciary duty standard.¹¹⁷ Section 510 seeks to protect employees and plan beneficiaries who report an alleged fiduciary duty violation.¹¹⁸ An employee or beneficiary who “gives information or has testified or [is] about to testify in any inquiry or proceeding relating to the Welfare and Pension Plans Disclosure Act” is protected from any resulting employer retaliation.¹¹⁹ Under Section 510, it is unlawful for any person to retaliate against a participant or beneficiary for exercising such protected rights granted under the

113. See *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142-43 (1990).

114. 29 U.S.C. § 1140.

115. 29 U.S.C. § 1001(a).

116. *Ingersoll-Rand*, 498 U.S. at 137 (quoting S. REP. NO. 93-127, at 36 (1973), reprinted in 1974 U.S.C.C.A.N. 4838, 4872).

117. 29 U.S.C. § 1140; see *supra* Part I.B.1.

118. 29 U.S.C. § 1140 (“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 chapter or the Welfare and pensions Plans Disclosure Act.”).

119. *Id.*

employee benefit plan, under ERISA or the Welfare and Pension Plans Disclosure Act.¹²⁰ This includes protection from a broad range of retaliatory actions such as: discharging, fining, suspending, expelling or discriminating.¹²¹ Section 510 is uniquely distinct from other statutes about arbitrary and retaliatory discharge¹²² because it expands protections to a larger group of people: ERISA beneficiaries and fiduciaries.¹²³ Congress specifically enacted this provision in order to prevent “unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension benefits.”¹²⁴

2. Whistleblowing Laws

Whistleblowing provisions specifically serve protective purposes.¹²⁵ A “whistleblower” is a person who seeks to correct or change current practices by disclosing information about the current practice.¹²⁶ The broad purpose of whistleblower provisions is to eliminate the fear of retaliation for voicing concerns or grievances.¹²⁷ Facilitating such admissions encourages transparency, disclosure and is considered to be vital to a “democratic, free enterprise system.”¹²⁸ As is the case with Section 510, statutes that protect whistleblowers are not required to specifically use the term “whistleblower.”¹²⁹ This protection

120. *Id.* (“It shall be unlawful for any person to discharge, fine, suspend, expel or discriminate against . . .”).

121. *Id.*

122. *E.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-17 (2013) (prohibiting discharges based on sex, race, color, religion or national origin); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (2013) (prohibiting discharges based on age); National Labor Relations Act of 1935, 29 U.S.C. § 158(a)(3) (2013) (prohibiting discharges based on union organizing activity).

123. 29 U.S.C. § 1140.

124. *Gavalik v. Cont’l Can Co.*, 812 F.2d 834, 851 (3d Cir. 1987) (quoting *West v. Butler*, 621 F.2d 240, 245 (6th Cir. 1980)).

125. *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

126. MARCIA P. MICELI & JANET P. NEAR, *BLOWING THE WHISTLE* 15 (Arthur P. Brief et al. eds., 1992).

127. *See Robert De Mario Jewelry*, 361 U.S. at 292.

128. DANIEL P. WESTMAN & NANCY M. MODESITT, *WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE* 22 (2d ed. 2004).

129. *See id.*

of whistleblowers is naturally inferred from the anti-retaliation provisions.¹³⁰

A statute's anti-retaliation provision "seeks to secure [a substantive right] by preventing an employer from interfering (by retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees."¹³¹ Thus, anti-retaliation provisions are generally understood to be "laws protecting whistleblowers . . . meant to encourage employees to report illegal practices without fear of reprisal by their employers."¹³² Because such statutes generally employ broad language to cover a variety of whistleblowing activities "when the meaning of the statute is unclear from its texts, courts tend to construe it broadly, in favor of protecting the whistleblower."¹³³ This interpretation construction is often the best way to avoid illogical results that counter "effectuate[ing] the underlying purposes of the law" and to ultimately hold employers accountable.¹³⁴

Whistleblowing is comprised of two reporting act categories: internal and external.¹³⁵ The distinction between these two categories lies at the heart of the Circuit courts' fractured and conflicting interpretation of Section 510's protection.¹³⁶ Internal whistleblowing is when employees report or submit objections of alleged violations within the organization.¹³⁷ External whistleblowing is when an employee reports or submits objections to alleged violations outside the organization to a governing agency, entity, officer etc.¹³⁸ Section 510 protects all external complaints (solicited and unsolicited) and internal solicited complaints.¹³⁹ However, there is an interpretive dissention

130. *See id.*

131. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006).

132. *Haley v. Retsinas*, 138 F.3d 1245, 1250 (8th Cir. 1998); *accord Hill v. Mr. Money Fin. Co.*, 309 F. App'x 950, 961 (6th Cir. 2009).

133. *Haley*, 138 F.3d at 1250; *accord Mr. Money Fin. Co.*, 309 F. App'x at 961.

134. *Haley*, 138 F.3d at 1250; *accord Mr. Money Fin. Co.*, 309 F. App'x at 961.

135. Terry M. Dworkin & Melissa S. Baucus, *Internal vs. External Whistleblower: A Comparison of Whistleblowing Processes*, 17 J. BUS. & ETHICS 1281, 1281 (1998).

136. *See infra* Part II for an in depth discussion.

137. WESTMAN & MODESITT, *supra* note 128, at 23.

138. *See id.*

139. The term "solicited" refers to instances when a whistleblower is requested, encouraged, or investigated to disclose a violation and is prompted into whistleblowing by another entity.

about whether Section 510 protects unsolicited internal complaints.¹⁴⁰ The purpose of this Note pertains to the fragmenting issue of whether unsolicited internal complaints should be protected under ERISA Section 510.

3. Language of Section 510

Interpreting Section 510 necessarily begins with construing the statute's language.¹⁴¹ Section 510 of the ERISA provides, in relevant part, that:

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 chapter or the Welfare and Pension Plans Disclosure Act.¹⁴²

Section 510's anti-retaliation whistleblowing protection requires that: (1) the employee participated in a statutorily protected activity (2) an adverse employment action was taken against the employee and (3) a causal connection exists between the first two elements.¹⁴³ For the purposes of this Note, the key interpretive objective is to understand the scope of what constitutes statutorily protected conduct and whether unsolicited internal complaints falls within this category.

II. CIRCUIT SPLIT: ARE UNSOLICITED INTERNAL COMPLAINTS PROTECTED?

Part II of this Note will address the interpretive conflict among seven federal circuit courts regarding whether unsolicited internal

140. The Fourth, Second and Third Circuits have held that Section 510 does not protect unsolicited internal complaints. *See infra* Part II.C for an in depth discussion.

141. 2A SUTHERLAND, STATUTORY CONSTRUCTION § 46.01 (7th ed. 1984).

142. 29 U.S.C. § 1140 (emphasis added) (citation omitted).

143. *Rath v. Selection Research, Inc.*, 978 F.2d 1087, 1090 (8th Cir.1992) (to establish a *prima facie case of retaliation*, Plaintiff "must prove that he participated in a statutorily protected activity . . . that an adverse employment action was taken against him . . . and that a *causal connection* existed between the two.") (emphasis added).

complaints are protected from retaliation under Section 510.¹⁴⁴ Section 510 is universally understood to protect whistleblowing employees when giving information or testifying in court about violations to external entities such as the Department of Labor.¹⁴⁵ However, the focus of dissension is whether employees who voluntarily notify supervisors or employers of ERISA violations within the company are protected under Section 510.¹⁴⁶ Specifically, circuits are split about whether unsolicited internal complaints fall within the ambit of Section 510's "inquiry or proceeding."¹⁴⁷ Part II will discuss the revival of this split with the Sixth Circuit's recent affirmation of Section 510's protection, and the urgent need for the Supreme Court to grant certiorari.¹⁴⁸ Next, this part will discuss the seminal Section 510 interpretative cases in the Ninth, Fifth and Seventh circuits and their holding that unsolicited internal complaints are protected.¹⁴⁹ Lastly, this part will address the seminal cases and contrasting interpretation of Section 510 by the Fourth, Second, Third and Sixth Circuits, which denies unsolicited internal complaints any whistleblower protection.¹⁵⁰

144. *Circuits Split over Whether ERISA Section 510 Applies to Retaliation Claims*, ERISA AND LIFE INSURANCE NEWS (Smith Moore Leatherwood LLP), Dec. 2012, at 1-4, <http://smithmoorelaw.com/files/ERISA-December-2012-web-r.pdf>.

145. *See, e.g.*, *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 223 (3d Cir. 2010) (noting that had Defendant provided the complaint to an outside body they would have been protected by Section 510); *King v. Marriott Int'l, Inc.*, 337 F.3d 421, 427 (4th Cir. 2003) (articulating that an unsolicited *external* complaint would be protected).

146. *See King*, 337 F.3d at 427 (holding unsolicited internal complaints are not afforded Section 510 whistleblower protection); *cf. Hashimoto v. Bank of Haw.*, 999 F.2d 408, 408 (9th Cir. 1993) (holding unsolicited internal complaints are afforded Section 510 whistleblower protection).

147. 29 U.S.C. § 1140.

148. *See generally* SCOTT L. NELSON, GETTING YOUR FOOT IN THE DOOR: THE PETITION FOR CERTIORARI (PUB. CITIZEN LITIG. GRP.), *available at* <http://www.citizen.org/documents/GettingYourFootintheDoor.pdf> (outlining the requirements and considerations for petitioning for certiorari from the Supreme Court).

149. *George v. Junior Achievement of Cent. Ind., Inc.*, 694 F.3d 812 (7th Cir. 2012); *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1312 (5th Cir. 1994); *Hashimoto v. Bank of Haw.*, 999 F.2d 408 (9th Cir. 1993).

150. *Sexton v. Panel Processing, Inc.*, 754 F.3d 332 (6th Cir. 2014); *A.H. Cornell*, 610 F.3d at 223; *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 328-29 (2d Cir. 2005); *King*, 337 F.3d at 427.

A. FURTHER FRACTURING OF THE CIRCUIT SPLIT REQUIRES SUPREME
COURT'S ATTENTION

The appeal of *Sexton v. Panel Processing* granted the Sixth Circuit Court of Appeals a first-time opportunity to assert a position in the unresolved circuit split about whether unsolicited internal ERISA complaints are afforded protection.¹⁵¹ Their affirmation of the Eastern District Court of Michigan's denial of whistleblower protection has further widened the gap between the circuits, resulting in tattered protection across the states.¹⁵² Thus, it is increasingly imperative that the Supreme Court grant certiorari to resolve this split amongst seven circuits.¹⁵³ In doing so, the Supreme Court is likely to refer to and address each circuit's decision and rationale in order to glean an interpretation that remains consistent with the intent and purpose of both of ERISA broadly and Section 510 specifically.¹⁵⁴

B. SECTION 510 BROADLY PROTECTS UNSOLICITED INTERNAL
COMPLAINTS

1. Ninth Circuit

The Ninth Circuit was the first circuit to expressly adopt a pro-plaintiff interpretation of Section 510 in *Hashimoto v. Bank of Hawaii*.¹⁵⁵

Plaintiff Jessica Hashimoto alleged she was discharged from the Bank of Hawaii in retaliation for reporting ERISA violations to supervisors.¹⁵⁶ Hashimoto specifically objected to her supervisor's inappropriate direction to reimburse former employees from a profit-sharing plan that had been properly withheld from a lump sum distribution of his account.¹⁵⁷ She also alleged that another supervisor

151. *Sexton v. Panel Processing Inc.*, 912 F. Supp. 2d 457, 459 (E.D. Mich. 2012).

152. *See Sexton*, 754 F.3d at 332.

153. *See NELSON*, *supra* note 148.

154. *See, e.g., Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011) (discussing circuit cases, definitions, state statutes and legislative history to assess Fair Labor Standard Act's anti-retaliation statute).

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

156. *Id.* at 409.

157. *Id.* at 410.

instructed her to violate ERISA regulations by recalculating a former employee's pension plan benefit using the final pay, and not the final average pay.¹⁵⁸ Hashimoto contended that her unsolicited internal objections to the alleged ERISA regulatory and fiduciary duty violations and subsequent termination brought her within the realm of Section 510's whistleblower protection.¹⁵⁹

The Ninth Circuit expressly disagreed with the district court's grant of summary judgment for wrongful discharge in favor of Bank of Hawaii.¹⁶⁰ Bank of Hawaii had removed the case to district court, which then granted summary judgment to the bank upon determining that ERISA preempted Hashimoto's state law claim.¹⁶¹ On appeal, the Ninth Circuit concluded that Section 502(a) granted Hashimoto the opportunity to bring a cause of action for relief.¹⁶² Thus, the Ninth Circuit determined ERISA completely preempted state law because the case could be addressed as a federal action.¹⁶³ The Court subsequently remanded for trial on the basis that Hashimoto's unsolicited internal complaint should be characterized as an ERISA claim under Section 510.¹⁶⁴

The Ninth Circuit reached the decision to extend Section 510 protection to unsolicited internal complaints by analyzing the anti-retaliation provision's language.¹⁶⁵ The court reasoned that because Section 510 provides protection to any individual who gives "information or has testified or is about to testify in any inquiry or proceeding" related to ERISA, Congress intended to protect whistleblowers.¹⁶⁶ The Ninth Circuit also noted that Section 510 was created as a safeguard to provide a remedy for an employee or plan beneficiary that is terminated solely because they supplied vital ERISA related information.¹⁶⁷ Thus, the court acknowledged that because the statute was created specifically to protect whistleblowers, it is

158. *Id.*

159. *Id.*

160. *Id.* at 412.

161. *Id.* at 410.

162. *Id.* at 411.

163. *Id.* at 412; *see supra* Part I.B.3.

164. *See Hashimoto*, 999 F.2d at 409.

165. *Id.* at 411.

166. *Id.*

167. *Id.*

reasonable to construe Section 510 to protect unsolicited internal complaints such as Hashimoto's.¹⁶⁸

The court addressed the scope of Section 510's protection of an "inquiry or proceeding" by analyzing the process an employee would undergo to submit a whistleblower complaint.¹⁶⁹ The court reasoned that the first step in giving information or testifying about a problem is to present the issue in a complaint to those responsible for the ERISA plans within the company, rather than directly proceeding to an outside governing agency.¹⁷⁰ However, if an individual's employment is terminated for raising this issue, the process of giving information or testifying is immediately halted.¹⁷¹ The court reasoned that narrowly construing Section 510 would allow employers to escape the consequences of retaliation by encouraging the immediate dismissal of employees to halt the whistleblowing process.¹⁷² Such an "anticipatory discharge discourages the whistle blower before the whistle is blown."¹⁷³ Although the court did not address whether Section 510 protects all employees discharged for submitting ERISA related complaints to employers, the Ninth Circuit clearly endorsed a broad construction of Section 510 upon determining that the provision was clearly meant to protect whistleblowers.¹⁷⁴

2. Fifth Circuit

The Fifth Circuit was the second circuit to determine unsolicited internal complaints were protected under Section 510 in *Anderson v. Electronic Data Systems Corp.*¹⁷⁵

Plaintiff George Anderson claimed he had a Section 510 retaliatory termination claim against his former employer Electronic Data Systems Corporation, because the company allegedly terminated him for refusing to engage in ERISA violating actions and subsequently reporting such

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *See id.*

175. *Anderson v. Elec. Data Systems Corp.*, 11 F.3d 1312, 1315 (5th Cir. 1994).

actions internally.¹⁷⁶ Anderson alleges that in violation of ERISA, he was asked on two separate occasions to sign approval or payment invoices on pension portfolios without the approval of the pension trustees.¹⁷⁷ Additionally, Anderson was also requested to write minutes for Electronic Data Services' Retirement Plan meetings he did not attend, in violation of ERISA.¹⁷⁸ Anderson refused to participate in any of these requests and reported all such incidents to management.¹⁷⁹ He alleged he was demoted and discharged in retaliation for his refusal to comply with the illegal requests and accordingly is protected under Section 510.¹⁸⁰

Rather than engage in statutory interpretation like other circuits, the Fifth Circuit immediately and expressly accepted unsolicited internal complaints to fall within Section 510's protection.¹⁸¹ The Fifth Circuit focused primarily upon whether the federal courts had subject matter jurisdiction and if ERISA preempted state law claims.¹⁸² As in *Hashimoto*, defendant Electronic Data Systems also removed the case to federal court, which led to summary judgment in favor of Electronic Data Systems on the state wrongful discharge claim.¹⁸³ Anderson subsequently appealed.¹⁸⁴ Anderson argued that because the district court lacked subject matter jurisdiction, the wrongful discharge claim should be remanded back to state court.¹⁸⁵ In fact, in order to keep the case in state court, Anderson had purposely removed all mention of ERISA.¹⁸⁶

On appeal, the Fifth Circuit analyzed whether ERISA preemption applied when a federal cause of action is not asserted.¹⁸⁷ The court began this analysis by deliberating if Anderson's state law claims were

176. *Id.* at 1312.

177. *Id.*

178. *Id.*

179. *Id.* at 1313.

180. *Id.* at 1312-13.

181. *Id.* at 1313-15.

182. *Id.* at 1314-15.

183. *Id.* at 1313; *Hashimoto v. Bank of Haw.*, 999 F.2d 408, 412 (9th Cir. 1993); *see supra* Part I.B.3 (discussing preemption).

184. *Anderson*, 11 F.3d at 1313.

185. *Id.*

186. *Id.*

187. *Id.*

preempted by ERISA.¹⁸⁸ The court referenced the *Ingersoll-Rand Co. v. McClendon*¹⁸⁹ decision in which the Supreme Court held that ERISA preempted state wrongful discharge claims because the claim depended on the presence of an ERISA plan.¹⁹⁰ The wrongful discharge claim conflicted with the ERISA Section 502 enforcement provision and fell “squarely within the ambit” of Section 510.¹⁹¹ Therefore, the claim was preempted.¹⁹² The court determined that because Anderson’s claim relied on his refusal to commit ERISA violations and he alleged being terminated in retaliation for reporting ERISA violations, the claim required the “existence” of an ERISA plan.¹⁹³ Thus, ERISA preempted the wrongful discharge state claim.¹⁹⁴

In order to determine whether the court had subject matter jurisdiction the court again looked to Supreme Court’s rationale, this time in *Metropolitan Life Insurance Co. v. Taylor*.¹⁹⁵ Here, the Supreme Court articulated that ERISA preempts a cause of action that can be categorized under Section 502, which consequently enforces Section 510, and thus is removable to federal courts.¹⁹⁶ Therefore, the Fifth Circuit concluded that the federal court had appropriate subject matter jurisdiction because Anderson’s claim falls within the ambit of Section 510’s prohibition of discharging employees for providing ERISA related information or testimony.¹⁹⁷

3. Seventh Circuit

The Seventh Circuit, in *George v. Junior Achievement of Cent. Ind., Inc.*,¹⁹⁸ is the most recent circuit to determine Section 510 protected unsolicited internal complaints.

188. *See id.*

189. *See id.* (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 133 (1990)).

190. *See Ingersoll-Rand*, 498 U.S. at 140.

191. *Id.* at 142.

192. *See id.* at 144.

193. *Anderson*, 11 F.3d at 1314; *see Ingersoll-Rand*, 498 U.S. at 140.

194. *See Anderson*, 11 F.3d at 1314.

195. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) (quoting *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1987)).

196. *Id.* at 52.

197. *See Anderson*, 11 F.3d at 1315.

198. *See George v. Junior Achievement of Cent. Ind., Inc.*, 694 F.3d 812, 817 (7th Cir. 2012).

Plaintiff Victor George alleged wrongful termination for internally raising attention to discrepancies of his ERISA plan.¹⁹⁹ As Vice President of the Junior Achievement of Central Indiana, Inc., George discovered money withheld from his salary was not being deposited into either his retirement account or his health savings account.²⁰⁰ He then lodged complaints with the corporation's accountants and executives, including the President and Chief Executive Officer.²⁰¹ Although he did share his concern with the United States Department of Labor, he declined to file a written complaint.²⁰² Soon after expressing his objections to members of the Junior Achievement's board, George received checks to make up for the missed deposit, including interest.²⁰³ In early January 2010, Junior Achievement noticed George had drawn the account containing his deferred compensation.²⁰⁴ Considering this to be premature, Junior Achievement sent a termination letter stating George was discharged effective December 31, 2009 and required that he immediately restore the withdrawn sums to the deferred compensation account.²⁰⁵ George responded by informing Junior Achievement the amendment to his employee agreement noted December 1, 2009 as the vesting date for his differed-compensation account.²⁰⁶ Regardless, Junior Achievement did not rescind George's termination.²⁰⁷ George alleged he was terminated in retaliation for initially raising objections about the discrepancy in his ERISA related account and, therefore, he was protected by Section 510.²⁰⁸

The Seventh Circuit addressed this issue with an additional, influential tool unavailable to any of the prior decisions: the Supreme Court's decision in *Kasten v. Saint-Gobain Performance Plastics Corp.*²⁰⁹ The *Kasten* decision suggested that when dealing with

199. *Id.* at 813-14.

200. *Id.* at 813.

201. *Id.*

202. *Id.*

203. *Id.* (noting Plaintiff received roughly \$2,600).

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 813-14.

209. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1331 (2011).

ambiguous anti-retaliation provisions, courts should resolve the ambiguity in favor of protecting employees if it is in accordance with the statute's purpose.²¹⁰ Although the Seventh Circuit did not discuss preemption, it launched into a detailed approach to the statutory interpretation of Section 510.²¹¹

The Seventh Circuit approached the issue by noting that the point of disagreement is whether a Section 510 "inquiry" occurred.²¹² The Seventh Circuit engaged in its understanding of "inquiry" by parsing the phrase to imply that Section 510 covers both informal and formal approaches.²¹³ The Court stressed that because the understanding of the phrase can be construed both ways, the language is ambiguous.²¹⁴ The court recognized that dictionaries often contain both formal and informal definitions of "inquiry" but the added Supreme Court decision in *Kasten* encourages adopting an understanding that would primarily protect employees and be consistent with the statutory context.²¹⁵ Ultimately, the court rejected adding modifiers such as "formal" or "solicited" to the understanding of "inquiry" in Section 510 because the text must be enforced as it is enacted, without any additions.²¹⁶

The court also focused on the multiple definitions of "inquiry."²¹⁷ Despite the resulting awkward parallel construction, certain definitions (if imported) would be applicable to covering the full range of formal and informal inquiries.²¹⁸ The court provided the example of inquiry being "[t]he action of asking or questioning" which would provide a better, albeit awkward prose than purely limiting Section 510 to formal proceedings and solicited inquiries.²¹⁹

Furthermore, the court rebuffed the argument that if "inquiry" is analogous with "question" then protection is applied only to questions

210. *Id.* at 1333-34; *Crawford v. Metro. of Nashville*, 555 U.S. 271, 278-79 (2009). *Kasten* is discussed in depth in Part III.D.2.

211. *George*, 694 F.3d at 813.

212. *Id.* at 815.

213. *Id.*

214. *See id.*

215. *See id.*

216. *Id.* *See also* *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1330 (2011).

217. *George*, 694 F.3d at 815.

218. *See id.*

219. *Id.* (citing OXFORD ENGLISH DICTIONARY 1010 (2d ed. 1989)).

asked *of* employees but not *by* employees.²²⁰ The court contended that no linguistic reason exists for why “inquiry” cannot refer to both employee and employer questions.²²¹ The court reasoned that to hold otherwise would illogically treat Section 510 to protectively cover only half the dialogue between employer and employee.²²² The court articulated that because Section 510 refers to inquire broadly, without specification of who is initiating the inquiry, it therefore covers employee inquiries.²²³ The Seventh Circuit further focused on the preposition “in” in the Section 510 phrase “*in* any inquiry or proceeding.”²²⁴ The court conceded that to interpret “inquiry” as “question” would make its replacement in the phrase grammatically incorrect.²²⁵ However, the court stressed that the phrase is concerned with the setting of the information, but not just *where* the information is given, rather *how* the information is given.²²⁶

The Seventh Circuit also determined that a complaint is the first step in an inquiry.²²⁷ The court found this argument to be particularly persuasive because although a complaint standing alone is not “civil litigation” it is the first step in a formal litigation process that would make a more formal “inquiry” inevitable.²²⁸ Thus, the Seventh Circuit concluded that regardless of whether or not the employee’s complaints are solicited, Section 510 protects them.²²⁹ Therefore, conversations George engaged in regarding the potential breach of ERISA fiduciary duties constituted an “inquiry” and required the district court’s judgment against George be vacated.²³⁰

220. *Id.* (rejecting the Third Circuit’s approach in *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 223 (3d Cir. 2010)).

221. *Id.*

222. *See id.*

223. *See id.*

224. *Id.*; 29 U.S.C. § 1140 (emphasis added).

225. *George*, 694 F.3d at 815.

226. *See id.*

227. *Id.* at 816-17.

228. *See Hashimoto v. Bank of Haw.*, 999 F.2d 408, 409-11 (9th Cir. 1993); *see also Neal v. Honeywell Inc.*, 33 F.3d 860, 863-64 (7th Cir. 1994) (stating that the anti-retaliation provision of the False Claims Act covers initial investigations and the first step in an “action filed or to be filed”).

229. *George*, 694 F.3d at 817.

230. *Id.*

C. SECTION 510 DOES NOT PROTECT UNSOLICITED INTERNAL
COMPLAINTS

Although the interpretations put forth by the Second, Third, Fourth and Sixth Circuits do not protect unsolicited internal complaints, each circuit implements varying interpretational approaches to reach that supposition.²³¹

I. Fourth Circuit: Only Formal Complaints Are Protected

The Fourth Circuit determined that Section 510 only protects “formal” complaints in *King v. Marriott International, Inc.*²³²

Plaintiff Karen King alleged retaliatory discharge after objecting to her employer’s alleged ERISA violations.²³³ As an employee in Marriott’s benefits department, around late 1998 to early 1999, King was concerned over the appropriateness of the recommendation from Compensation and Benefits Senior Vice President Frederick that Marriott transfer millions of dollars into its general corporate reserve account from its medical plan.²³⁴ King expressed her reservations regarding the propriety of such a transfer to coworkers and directly to Fredericks.²³⁵ In late 1999, after Fredericks promoted her, King once again learned and consequently objected to the revival of the plan to transfer funds in violation of ERISA.²³⁶ King took several actions to express her opposition, including protesting to Fredericks, expressing her concerns about the transfer’s legal implications with two in-house attorneys and obtaining an opinion letter from a Marriott in-house attorney.²³⁷ In September 1999, the benefits department was restructured and King was again promoted to Vice President of Benefits

231. See *Sexton v. Panel Processing, Inc.*, 754 F.3d 332 (6th Cir. 2014); *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217 (3d Cir. 2010) (discussed *infra* Part II.C.3); *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 327 (2d Cir. 2005) (discussed *infra* Part II.C.2); *King v. Marriott Int’l, Inc.*, 337 F.3d 421, 427 (4th Cir. 2003) (discussed *infra* Part II.C.1).

232. *King*, 337 F.3d at 421.

233. *Id.* at 423.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

Resources.²³⁸ In early 2000 when another transfer of funds from the medical plan was proposed, King again objected verbally and in writing to Fredericks.²³⁹ She was terminated soon thereafter.²⁴⁰ King then brought a claim alleging Marriott International, Inc. illegally retaliated by terminating her for her lodged objections to the fund transfer.²⁴¹

As most other plaintiffs, King originally filed an action under Maryland public policy exception to the at-will employment doctrine by claiming that the discharge violated Maryland's public policy.²⁴² Marriott, like the other circuit's defendants,²⁴³ removed the case to federal court arguing ERISA preempted the state wrongful discharge claim.²⁴⁴ The district court denied King's motion to remand and granted summary judgment in Marriott's favor.²⁴⁵ On appeal, the Fourth Circuit deliberated whether Section 510 preempted King's state law wrongful discharge complaint.²⁴⁶ Interestingly, unlike other circuits, the Fourth Circuit held that because Section 510 did not cover King's internal, thus informal, complaint—her state law claim did not fall within the boundaries of a federal ERISA claim.²⁴⁷ Thus, after engaging in a statutory interpretation of Section 510's protection, the court remanded the case to state court for further proceedings.²⁴⁸

The Fourth Circuit focused on the Section 510 language to determine that only "formal" complaints were protected.²⁴⁹ The court

238. *Id.*

239. *Id.*

240. *See id.*

241. *See id.*

242. *See id.*

243. *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1312, 1313 (5th Cir. 1994); *Hashimoto v. Bank of Haw.*, 999 F.2d 408, 412 (9th Cir. 1993); *see also supra* Part I.B.3.

244. *King*, 337 F.3d at 423.

245. *Id.* at 423-24.

246. *Id.* at 426-28.

247. *Id.* at 428. *Contra Anderson*, 11 F.3d at 1313; *see Hashimoto*, 999 F.2d at 412 (finding state law was preempted by ERISA); *see supra* Part I.B.3.

248. *King*, 337 F.3d at 428; *see also King v. Marriott Int'l, Inc.*, 866 A.2d 895, 906 (Md. Ct. Spec. App. 2005). The Maryland Court of Special Appeals ultimately rejected King's argument that her termination violated public policy, and consequently, the claim did not fall within the public policy exception of Maryland's at-will employment doctrine.

249. *King*, 337 F.3d at 426-28.

reasoned that “instituted” connotes “a formality that does not attend an employee’s oral complaint to his supervisor.”²⁵⁰ In addition, the phrase “given information” protected the provision of non-testimonial information such as documents or evidence during an inquiry or proceeding.²⁵¹ The Fourth Circuit examined the factual basis of King’s complaint and determined that King’s actions did not bring her within the ambit of Section 510.²⁵² The complaint lacked any information that alleged King had testified in any legal or administrative proceeding or provided information for such a proceeding under the Fourth Circuit’s interpretation.²⁵³ Although King filed internal complaints with co-workers, supervisors and Marriott attorneys, the Fourth Circuit determined ERISA does not provide a federal cause of action for such unsolicited internal complaints.²⁵⁴

The court further justified the conclusion that Section 510 only protected “formal” complaints by comparing the Section 510 phrase “inquiry or proceeding” in relation with other statutes.²⁵⁵ In an earlier interpretation of the Fair Labor Standards Act’s (FLSA) similar provision, the Fourth Circuit determined the definition of “proceeding” referred only to administrative or legal proceedings, but not to informal internal complaints.²⁵⁶ Thus, the Court ruled that Congress intended the FLSA to only protect employees who engage and testify in “formal” proceedings.²⁵⁷ The Fourth Circuit justified this result by stating that Section 510’s anti-retaliation provision is much narrower than counterpart provisions in Title VII of the Civil Rights Acts of 1964, it consequentially requires a “much more circumscribed remedy.”²⁵⁸

The Fourth Circuit recognized its narrow interpretation of a formalistic requirement varied from Fifth and Ninth Circuits’ Section

250. See *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 364 (4th Cir. 2000).

251. *King*, 337 F.3d at 427.

252. See *id.*

253. *Id.* at 427-28.

254. *Id.* at 428.

255. *Id.* at 427.

256. *Id.*; 29 U.S.C. § 201 (FLSA); see *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 364 (4th Cir. 2000).

257. See *Memphis Bar-B-Q Co.*, 228 F.3d at 364.

258. *King*, 337 F.3d at 427 (quoting *Memphis Bar-B-Q Co.*, 228 F.3d at 364).

510 determinations.²⁵⁹ The Fourth Circuit criticized the Fifth Circuit's approach for merely reciting Section 510 without addressing the facial inapplicability to internal complaints or engaging in any statutory interpretation.²⁶⁰ It also argued that the Ninth Circuit's protection of unsolicited internal complaints was rooted fundamentally in the public policy of protecting whistleblowers, despite recognizing that Section 510 may be inapplicable to internal complaints.²⁶¹ Ultimately, the Fourth Circuit rejected the notion of yielding results specifically aligned with public policy when Section 510's language can be compellingly interpreted to deny protection to informal unsolicited internal complaints.²⁶²

2. Second Circuit: Cautious Approach Requiring Relation to "Inquiry or Proceeding"

The Second Circuit is the only circuit straddling the middle ground between entirely rejecting protection to all unsolicited internal complaints and affording them complete protection.²⁶³ The court cautiously addressed the parameters of Section 510's protection in *Nicolaou v. Horizon Media, Inc.*²⁶⁴

Plaintiff Chrystina Nicolaou alleged being terminated after finding, investigating and internally reporting ERISA violations at Horizon Media, Inc.²⁶⁵ As Director of Human Resources and Administration, Nicolaou was both a participant in Horizon Media's 401(k) employee benefit plans regulated by ERISA and a fiduciary trustee due to her occupational position.²⁶⁶ Nicolaou allegedly discovered a decade-long persisting payroll discrepancy that severely underfunded Horizon Media

259. See *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1312, 1315 (5th Cir. 1994); *Hashimoto v. Bank of Haw.*, 999 F.2d 408, 411 (9th Cir. 1993).

260. *King*, 337 F.3d at 428 (citing *Anderson*, 11 F.3d at 1315); see *supra* II.B.2 for Fifth Circuit analysis.

261. *King*, 337 F.3d at 428 (citing *Hashimoto*, 999 F.2d at 411); see *supra* II.B.1 for Ninth Circuit analysis.

262. *King*, 337 F.3d at 428.

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

264. *Id.*

265. *Id.* at 326-27.

266. *Id.* at 326; 29 U.S.C. §§ 1001-1461.

Inc.'s 401(k) plan.²⁶⁷ Nicolaou divulged the matter once to Horizon's Chief Financial Officer, who told her to drop the issue, and twice to Horizon's controller who neglected to address or rectify the issue.²⁶⁸ Upon recognizing that no remedial action was being taken, Nicolaou consulted Mark Silverman, a Horizon attorney, who undertook his own investigation into the matter and ultimately confirmed the ongoing underfunding.²⁶⁹ Nicolaou then met with the President of Horizon to discuss the persistent underfunding.²⁷⁰ Soon thereafter, Nicolaou was demoted to Office Manager and two replacements were hired to assume Nicolaou's former duties as Director of Human Resources and Administration.²⁷¹ She was ultimately terminated from Horizon and consequently brought a Section 510 claim asserting her demotion and termination for lodging ERISA violations was wrongful retaliation.²⁷²

Similar to the Fourth Circuit's approach, the Second Circuit focused its interpretation on contrasting Section 510 with other anti-retaliation provisions.²⁷³ In reviewing the district court's dismissal, the Second Circuit determined that its previous ruling in *Lambert v. Genesee Hospital*²⁷⁴ was not controlling or decisive.²⁷⁵ The Second Circuit contrasted Section 510's language with its whistleblowing counterparts in the Fair Labor Standards Act and the Title VII of the Civil Rights Act of 1964.²⁷⁶ The Second Circuit held that Section

267. *Nicolaou*, 402 F.3d at 326.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 327.

273. *See supra* Part II.C.1 for Fourth Circuit analysis.

274. 10 F.3d 46 (2d Cir. 1993).

275. *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 328 (2d Cir. 2005).

276. *Id.*; Fair Labor Standards Act 15(a)(3) codified at 29 U.S.C. § 215(a)(3) makes it unlawful "to 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 proceedings under or related to this chapter, or has testified or is about to testify in any such proceeding[.]" Civil Rights Act of 1964 Section 704(a), codified at 42 U.S.C. § 2000e-3(a), provides that:

It shall be unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this

15(a)(3) of Fair Labor Standards Act does not apply to retaliation resulting from unsolicited internal complaints, but rather, was limited to instances when an employee lodged a formal complaint or cooperated with a regulatory agency's investigation.²⁷⁷ Upon determining that it could "find no distinction" between FLSA's whistleblower provision and ERISA Section 510 the district court dismissed Nicolaou's claim because *Lambert* limited protection to external or solicited complaints.²⁷⁸

The Second Circuit found that FLSA, when contrasted with ERISA Section 510, lacked any plain language that encompassed unsolicited internal complaints made to a supervisor.²⁷⁹ Unlike the Fourth Circuit,²⁸⁰ the Second Circuit justified this distinction upon Section 510's "unambiguously broader" language than the language of FLSA's whistleblowing provision.²⁸¹ The whistleblowing provision of the FLSA extends retaliation protection to any person who "has filed any complaint or instituted or caused to be instituted any proceeding under or related to" the FLSA.²⁸² In comparison, ERISA Section 510 is applicable to "any *inquiry* or proceeding relating to ERISA."²⁸³

The Second Circuit next compared the connotations of "proceeding" and "inquiry."²⁸⁴ The court concluded that regardless of the formal undertones of "proceeding" which may refer to the progression of a lawsuit or any other action related to a court, agency or

subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

277. The court narrowly compared FLSA Section 15(a)(3) with the whistleblower provision in Title VII to determine that the Section 704(a) of Title VII phrase "opposed any practice" encompasses an individual's complaints to supervisors regardless of whether they also file other charges. *See Lambert*, 10 F.3d at 55.

278. *Nicolaou v. Horizon Media, Inc*, No. 01 Civ. 0785(BSJ), 2003 WL 22852680 at *2 (S.D.N.Y. Oct. 15, 2003).

279. *Nicolaou*, 402 F.3d at 328.

280. *Supra* Part II.C.1 for Fourth Circuit analysis.

281. *Nicolaou*, 402 F.3d at 328 (citing *Lambert*, 10 F.3d at 55).

282. *Id.* at 328 (citing 29 U.S.C. § 215(a)(3)).

283. *Id.* (citing 29 U.S.C. § 1140) (emphasis added).

284. *Nicolaou*, 402 F.3d at 328-29 (comparing the definition between Black's Law Dictionary and Webster's Third New International Dictionary).

other official body, “inquiry” refers broadly to any request for or gathering of information.²⁸⁵

Although the Second Circuit, did not address the broader question of whether Section 510 covers unsolicited complaints,²⁸⁶ the court cautiously distinguished the *Nicolaou* decision from *King*, in which the Fourth Circuit applied clear limits on Section 510.²⁸⁷ Rather than undertake the Fourth Circuit’s approach of focusing on the formality or informality of the circumstances, the Second Circuit relied on whether the circumstance surrounding the provision of information constitutes an ongoing “inquiry.”²⁸⁸ Thus, the Second Circuit applied a restrained approach to the interpretation of Section 510 and distinguished *King* for failing to interpret “inquiry” distinctly from proceeding.²⁸⁹ The Second Circuit also recognized that applying narrow reasoning, limits an ERISA fiduciary to four options: “(1) do nothing and face possible co-fiduciary liability under ERISA Section 405; (2) make [their] own inquiries among [their] superiors and face a retaliatory response; (3) bring the matter to the attention of a regulatory agency and hope that doing so is not discovered by [their] superiors, at least until the agency begins its own inquiry; or (4) take upon [their self] the burden, and the uncertain prospects, of filing a suit under the provision of ERISA which allows fiduciaries to seek ‘to enjoin any act or practice that violates’ the statute.”²⁹⁰

Nicolaou’s holding is limited to the finding that if *Nicolaou* could demonstrate that counsel arranged the meeting between *Nicolaou* and Horizon Media’s CEO, the meeting would fall “within the definition of an ‘inquiry’” and therefore be protected by Section 510.²⁹¹ The Second

285. *Nicolaou*, 402 F.3d at 329.

286. *Id.* at 332 (Pooler, J. concurring) (stating that, despite *Nicolaou*’s unclear scope, an “inquiry” within Section 510’s parameters occurred when she began conducting her own inquiry into the alleged payroll violation and “not merely from the point at which [she and outside counsel met with Horizon Media’s officials]”).

287. *Id.* at 329 (citing *King v. Marriott Int’l, Inc.*, 337 F.3d 421, 427 (4th Cir. 2003)).

288. *Nicolaou*, 402 F.3d at 330; *King*, 337 F.3d at 427 (determining that the usage of “inquiry or proceeding” regards only “the legal or administrative, or at least . . . something more formal than written or oral complaints made to a supervisor”).

289. *Nicolaou*, 402 F.3d at 330.

290. *Id.* at 331 (Pooler, J., concurring).

291. *Nicolaou*, 402 F.3d at 330.

Circuit is the only circuit to take a middle ground approach that refrains from embracing a decisive rejection or acceptance of whether unsolicited internal complaints are protected.²⁹²

3. Third Circuit: Unsolicited Complaints are Not Protected

The Third Circuit also held that unsolicited internal complaints are outside of Section 510 protection in *Edwards v. A.H. Cornell & Son, Inc.*²⁹³

Plaintiff Shirley Edwards contended that upon discovering alleged ERISA violations, she was wrongfully terminated from her position for raising objections.²⁹⁴ Edwards, in her capacity as Director of Human Resources, alleged finding ERISA violations.²⁹⁵ She claimed to have discovered the corporation was engaging in many ERISA violations such as: administering group health plans in a discriminatory way, attempting to deter employees from opting into benefits by misrepresenting the cost of group health coverage, and providing false social security numbers and information to insurance carriers in an effort to enroll non-citizens in the corporation's ERISA plans.²⁹⁶ Edwards alleged that her employment was terminated for complaining about the described violations to A.H. Cornell's management.²⁹⁷ Edwards contended she fell within Section 510's ambit and had a claim against her employer for wrongfully retaliatory termination resulting from lodging ERISA-related complaints.²⁹⁸

The Third Circuit built its decision about Section 510's protection by analyzing the plain language meaning of "inquiry."²⁹⁹ Finding that Edwards had duly "given information" by objecting to management about the alleged violations, the Third Circuit approached the scope of Section 510 by determining if the objection was part of any "inquiry or proceeding."³⁰⁰ The Third Circuit rejected Secretary of Labor's

292. *Id.*

293. 610 F.3d 217, 225 (3d Cir. 2010).

294. *Id.* at 218.

295. *Id.* at 218-19.

296. *Id.* at 219.

297. *Id.*

298. *Id.* at 218.

299. *Id.* at 222.

300. *Id.*

argument that “[b]roadly but naturally construed, ‘any inquiry or proceeding’ encompasses plan participants’ complaints to management or plan officials about wrongdoing, and the process by which that information is considered, however informal.”³⁰¹ Instead, the court referred to Black’s Law Dictionary definition of, “[a] request for information.”³⁰² Because Edwards was not approached or requested to provide information regarding the ERISA violation, but rather voluntarily lodged a complaint on her own accord, the court rejected Edwards’ claims.³⁰³

Furthermore, the court rejected Edwards’ argument that her objections and complaints were themselves an inquiry.³⁰⁴ The court found that the complaints were mere statements, not questions seeking information.³⁰⁵ Section 510 protects employees who have “given” information but not those who have “received,” so a plain reading would limit that inquiries be made of an employee, but not by an employee.³⁰⁶ The court held that although the complaints could eventually have led to a protected inquiry, they had not developed to be protected by Section 510 when Edwards was terminated.³⁰⁷

The Third Circuit also interpreted “proceeding” in line with the Fourth and Second Circuit to constitute a formal, administrative progression and are thereby inapplicable to Edwards’ complaints.³⁰⁸ The ruling meant no inquiry or proceeding, under the terms’ plain meanings, occurred.³⁰⁹ The district court dismissed Edwards’ claim after finding, under the Second Circuit’s analysis in *Nicolaou*, Edwards’ complaints to

301. Brief of the Secretary of Labor, Hilda L. Solis, as Amicus Curiae in Support of Plaintiff-Appellant at 16, *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217 (3d Cir. 2010) (No. 09-3198).

302. *A.H. Cornell*, 610 F.3d at 223 (quoting BLACK’S LAW DICTIONARY 864 (9th ed. 2009)).

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *See id.* (quoting BLACK’S LAW DICTIONARY 1324 (9th ed. 2009)) (defining proceeding as “[t]he regular and orderly progression of a lawsuit” or the “procedural means for seeking redress from a tribunal or agency.”); *see Nicolaou*, 402 F.3d at 328-29 (comparing the definition between Black’s Law Dictionary and Webster’s Third New International Dictionary).

309. *A.H. Cornell*, 610 F.3d at 223.

A.H. Cornell management did not constitute an “inquiry or proceeding.”³¹⁰

The Third Circuit also justified its decision that Section 510 of ERISA is distinguished from the similar anti-retaliation provisions in Section 704(a) of Title VII.³¹¹ Opposed to Section 510, Section 704(a) of Title VII employs broad language to extend expansive protection to employees that have “opposed any practice made an unlawful employment practice by [Title VII]”.³¹² Much like the Fourth Circuit, the Third Circuit found it persuasive that because Congress declined employing the same broad language in Section 510, the protections afforded must differ.³¹³ Furthermore, the court found the Ninth and Fifth Circuit’s contrary decisions to be unpersuasive.³¹⁴

The Third Circuit also rejected the argument put forth by Edwards and the Secretary of Labor that Section 510 should be read broadly because it is a remedial statute.³¹⁵ The court held that ERISA provisions should only be “liberally construed” if the statutory text was ambiguous but because Section 510 provided an “unambiguous” plain meaning, the statute should not be liberally construed.³¹⁶ Furthermore, the court reasoned that had Congress intended a broader reading that denial of unsolicited internal complaints would undermine the provision’s purpose, Congress would have used broad language.³¹⁷ Thus, the Third Circuit held Edwards’ complaint did not fall within the ambit of Section 510 because it does not protect unsolicited internal complaints.³¹⁸

Judge Cowen dissented from the court’s narrow construction of Section 510’s protection for multiple reasons and instead argued that

310. *Id.* at 219; *see generally* Nicolaou v. Horizon Media, Inc., 402 F.3d 325 (2d Cir. 2005) (declining to extend Section 510 protection to unsolicited internal complaints).

311. *A.H. Cornell*, 610 F.3d at 223; 42 U.S.C. §2000e-3(2012).

312. *A.H. Cornell*, 610 F.3d at 223 (quoting 42 U.S.C. §2000e-3(a) (2012)).

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

314. *A.H. Cornell*, 610 F.3d at 223. The Third Circuit noted that the Fifth Circuit only “gave the issue cursory treatment” and the Ninth Circuit concentrated not on the statutory language but rather what would constitute a “‘fair’ interpretation.”

315. *Id.*; Brief for Appellant at *9-10, *A.H. Cornell*, 610 F.3d. 217 (3d Cir. 2009) (No. 09-3198), 2009 WL 6870703.

316. *A.H. Cornell*, 610 F.3d at 223.

317. *A.H. Cornell*, 610 F.3d at 224.

318. *Id.* at 218.

ERISA protected unsolicited internal complaints.³¹⁹ Judge Cowen's first point of disagreement is the majority's classification of the statutory language as unambiguous.³²⁰ Instead, Judge Cowen classifies the statutory language as ambiguous because it is extremely unlikely Congress intended ERISA's anti-retaliation provision to deny protection to a category of whistleblowing conduct.³²¹

The second fault Judge Cowen uncovers in the Third Circuit majority's decision is the disregard shown to the role Section 510 plays in safeguarding ERISA.³²² Congress included Section 510 as a safeguard in order to deter violations and "to completely secure the rights and expectations brought into being by this landmark reform legislation."³²³ Congress viewed this anti-retaliation provision as an essential facet in the implementation of the ERISA scheme because it "helps to make [ERISA's] promises credible."³²⁴ Judge Cowen puts forth that Congress clearly viewed this anti-retaliation to be a crucial statutory safeguard of ERISA "because, without it, employers would be able to circumvent the provision of promised benefits."³²⁵

Most importantly, Judge Cowen criticizes the court's unsustainable interpretation because it leaves the field of ERISA protection in absolute disarray.³²⁶ He criticizes that in defining "inquiry," the court adopts the Fourth and Second Circuit's narrow interpretation, when in reality, providing employees protection only after an initiated internal investigation is "unworkable in certain circumstances."³²⁷ He illustrates that the interpretation put forth only protects employees when they are asked a follow up question by a supervisor after lodging an ERISA complaint.³²⁸ He reasons that under this interpretation the employee is

319. *A.H. Cornell*, 610 F.3d at 226-27 (Cowen, J., dissenting).

320. *Id.*

321. *Id.*

322. *A.H. Cornell*, 610 F.3d at 226 (Cowen, J., dissenting).

323. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990) (quoting S.Rep. No. 93-127 at 36 (1973)).

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

325. *Ingersoll-Rand Co.*, 498 U.S. at 143 (citing S. Rep. No. 93-127 at 35-36; H.R.Rep. No. 93-533 at 17 (1973)).

326. *A.H. Cornell*, 610 F.3d at 227 (Cowen, J., dissenting).

327. *Id.*

328. *Id.* at 228.

not wholly protected and a supervisor is wrongly incentivized to immediately retaliate against the employee rather than conduct an investigation or raise questions regarding the matter.³²⁹

4. Sixth Circuit: Only Information in Inquiries are Protected

In 2012, the Eastern District Court of Michigan denied Section 510 protection to Plaintiff Brian Sexton for his unsolicited internal complaint, an email informing his employer of Sexton's intention to report ERISA violations to both state and federal employees.³³⁰ Sexton alleged his email complaint resulted in the subsequent termination of his position at Panel Processing.³³¹

The district court's rationale hinged on Section 510's language of "inquiry or proceeding" and the determination that the threatening email lacked any connection to either an inquiry or proceeding.³³² The court narrowly construed "inquiry" to mean "the act or an instance of asking for information."³³³ The Eastern District Court of Michigan concluded that when information regarding ERISA is not requested or solicited by any person, there exists no "inquiry."³³⁴ The court also decided that Sexton's ERISA related email did not constitute a proceeding because "proceeding" means "the course of procedure in a judicial action or in a suit in litigation."³³⁵ Because Sexton had not given information in an inquiry or proceeding, the Eastern District Court of Michigan held Sexton's unsolicited internal complaint outside of Section 510's protection.³³⁶ The court justified this restrictive construction of Section

329. *Id.*

330. *Sexton v. Panel Processing, Inc.*, 912 F. Supp. 2d 457, 463 (E.D. Mich. 2012).

331. *Id.* at 459.

332. *Id.*

333. *Sexton*, 912 F. Supp. 2d at 459; WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1167 (unabridged ed. 2002). BLACK'S also defines "inquiry" as "[a] request for information." BLACK'S LAW DICTIONARY 808 (8th ed. 2004).

334. *Sexton*, 912 F. Supp. 2d at 459.

335. *Id.* Analogously, BLACK'S defines "proceeding" as the "regular and orderly progression of a lawsuit," the "business conducted by a court or other official body" or "[a]ny procedural means for seeking redress from a tribunal or agency." *See Nicolaou*, 402 F.3d at 328-29 (comparing the definition between Black's Law Dictionary and Webster's Third New International Dictionary).

336. *Sexton*, 912 F. Supp. 2d at 475. Although Sexton had not taken his complaints to the U.S. Department of Labor, he had spoken with several lawyers after sending the

510's language on the belief that because Congress chose this particular language, to extend the meaning beyond the language would counter the congressional intent of the statute.³³⁷

The Sixth Circuit has affirmed the Eastern District Court of Michigan's decision regarding the range of Section 510.³³⁸ The Sixth Circuit put forth an interpretation on this issue within this past year after hearing oral arguments from both parties.³³⁹ Although the court recognized that Sexton was not attempting to claim the email amounted to testimony in an inquiry or proceeding, the court was particularly focused on whether the email constituted "giv[ing] information . . . in an inquiry."³⁴⁰ While the court conceded that the email was giving information, they held that it was not for an inquiry, or an official investigation.³⁴¹

The Sixth Circuit, in its decision, placed an emphasis on dissecting the clauses of other whistleblower claims.³⁴² Essentially, whistleblower protection laws fall into two categories: 1) clauses to protect those who provide information in an inquiry and 2) those that protect people who oppose unlawful practices.³⁴³ The court surmised that because Congress had only included the first type category in Section 510, Congress intended to exclude protecting people who oppose, report, or complain about unlawful practices.³⁴⁴ The courts perspective was that "[w]here words differ as they differ here, Congress acts intentionally and purposely in the disparate inclusion or exclusion."³⁴⁵

email about lawsuit options). *See generally* 29 U.S.C. § 1140 (providing whistleblower protection to a person who "has given information or has testified or is about to testify in any inquiry or proceeding").

337. *Sexton*, 912 F. Supp. 2d at 459-60.

338. *Sexton v. Panel Processing, Inc.*, 754 F.3d 332 (6th Cir. 2014).

339. Brief of Defendants – Appellees Panel Processing, Inc. at 10, *Sexton v. Panel Processing, Inc.*, 754 F.3d 332 (2014) No. 13-1604, 2013 WL 4401115 at *10; Brief of Plaintiff – Appellant Brian Sexton at 3, *Sexton v. Panel Processing, Inc.*, 754 F.3d 332 (2014) No. 13-1604, 2013 WL 3795752 at *3.

340. 29 U.S.C. §1140 (2012); *Sexton*, 754 F.3d at 334.

341. *See Sexton*, 754 F.3d at 335.

342. *Id.* at 335.

343. *See id.* at 335.

344. *See id.* at 336.

345. *Id.* at 336 (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006)).

III. SECTION 510 SHOULD PROTECT UNSOLICITED INTERNAL COMPLAINTS

Part III analyzes the issue of what lies in Section 510's future. As mentioned, this year the Sixth Circuit put forth its own interpretation of Section 510's protection in the appeal of *Sexton*.³⁴⁶ Given the sheer magnitude of the split and the growing number of involved circuits, the grant of certiorari could ultimately resolve the split.³⁴⁷ Should the Supreme Court grant certiorari, Part III focuses on persuasive arguments and tools that may be consulted or referred to in determining whether unsolicited internal complaints are protected. First, the Secretary of Labor has consistently advocated for a broad reading of Section 510.³⁴⁸ Next, this Part addresses the basis of statutory construction that may be employed in interpreting Section 510's protection. Then, Part III will recognize state remedies inadequacy of providing uniform remedies to employees across the nation. Part III also explains that although state whistleblowing laws have the capacity to broadly encompass unsolicited internal complaints, not all states have enacted such comprehensive whistleblowing laws. Additionally, a comparison to broad state and federal whistleblowing laws will depict a national trend of increasing whistleblower protective coverage. Lastly, Part III focuses on the adverse obstacle proponents of a broad Section 510 whistleblower coverage face if the Supreme Court utilizes textualism.

346. See *Sexton*, 754 F.3d 332; see *supra* II.A. for discussion.

347. NELSON, *supra* note 148, at 3; see, e.g., *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1330 (2011) (Supreme Court granting certiorari to resolve circuit split of FLSA's anti-retaliation statute).

348. See Part III.A; see, e.g., Brief of the Secretary of Labor as Amicus Curiae in Support of Appellant for Reversal at 5, *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325 (No. 03-9186) (advocating a broad interpretation of Section 510 to include unsolicited internal complaints); Brief of the Secretary of Labor, Hilda L. Solis, as Amicus Curiae in Support of Plaintiff-Appellant at 11, *George v. Junior Achievement of Cent. Ind., Inc.*, 694 F.3d 812 (No. 11-3291) (advocating a broad interpretation of Section 510 to include unsolicited internal complaints).

A. SECRETARY OF THE DEPARTMENT OF LABOR

The Secretary of the Department of Labor has remained active in these cases by submitting Pro-Plaintiff amicus curiae briefs.³⁴⁹ If a petition of certiorari is successful and the Supreme Court addresses the circuit split regarding Section 510, the Secretary's position may be of some relevance.³⁵⁰

The Secretary of the Department of Labor has submitted several briefs as part of its advocacy for a broad construction of Section 510.³⁵¹ The Supreme Court Justices have previously questioned the propriety of providing *Chevron* deference to such amicus curiae briefs.³⁵² The Court left the question unanswered and thus lower courts are only required to apply *Chevron* deference when an agency has the authority to issue regulations or enforce the rules in administrative proceedings.³⁵³

The Secretary's power is limited to that of a prosecutor, namely bringing suits and asking for judicial enforcement.³⁵⁴ Prosecutors, however, are not delegated any rulemaking or adjudicative authority in regards to Section 510.³⁵⁵ “[B]ecause Congress has expressly established

349. See Part III.A; see, e.g., Brief of the Secretary of Labor as Amicus Curiae in Support of Appellant for Reversal at 6-7, *Nicolaou*, 402 F.3d 325 (No. 03-9186) (encouraging the reversal of the lower court's narrow interpretation of Section 510); Brief of the Secretary of Labor, Hilda L. Solis, as Amicus Curiae in Support of Plaintiff at 11, *George*, 694 F.3d 812 (No. 11-3291) (endorsing a broad interpretation of Section 510).

350. E.g. NELSON, *supra* note 148, at 14 (discussing the petitioning process for Supreme Court certiorari).

351. See Brief of the Secretary of Labor as Amicus Curiae in Support of Appellant for Reversal, *Nicolaou*, 402 F.3d 325 (No. 03-9186); Brief of the Secretary of Labor as Amicus Curiae in Support of Appellant, *George*, 694 F.3d 812 (No. 11-3291).

352. See *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2165-69 (2012) (discussing whether amicus curiae briefs require *Chevron* deference); see also *Chevron, USA Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 846 (1984) (holding courts must defer to the statute interpretation made by government agencies responsible for enforcing them, unless the interpretation is unreasonable).

353. *Chevron*, 467 U.S. at 843-44 (“We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.”).

354. See *ERISA Enforcement*, U.S. DEP'T. OF LABOR, http://www.dol.gov/ebsa/erisa_enforcement.html (last visited Dec. 5, 2014).

355. See 29 U.S.C. § 1132(a)(5)-(e)(1).

the Judiciary and not the Department of Labor as the adjudicator of . . . rights of action arising under the statute,” *Chevron* deference does not apply.³⁵⁶ Thus, despite submitting amicus curiae briefs, the court has not always accepted the Department of Labor’s position.³⁵⁷ Therefore, although the Secretary’s arguments may receive respectful consideration, the law does not require courts to “defer” to the Department’s position.³⁵⁸

In the context of Section 510’s language, the Secretary clarifies that, unlike the words “testify” and “proceeding,” terms such as “information” and “inquiry” have an extremely broad scope, encompassing both internal and external complaints.³⁵⁹ Additionally, the Secretary specifically notes the Seventh Circuit’s broad approach in *George* appropriately recognized that “inquiry” is modified by the all-encompassing term “any.”³⁶⁰ Section 510 prefaces the mention of information given in “any inquiry” making it evident that Congress intended to cover “all kinds of investigation- whether formal or informal, internal or external.”³⁶¹ The Secretary of the Department of Labor also criticized the Fourth Circuit’s *King* rationale because it failed to address what distinguishes “inquiry” and “proceeding.”³⁶² Furthermore, the *King* court did not adequately consider the differentiation of scope between “given information” and “testify.”³⁶³

356. See *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990).

357. See, e.g., Brief of the Secretary of Labor as Amicus Curiae in Support of Appellant for Reversal at 12, *Nicolaou*, 402 F.3d 325 (No. 03-9186) (providing reasoning for adopting a broad interpretation for Section 510 that the court did not adopt).

358. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944).

359. See Brief of the Secretary of Labor as Amicus Curiae in Support of Appellant for Reversal at 6-7, *Nicolaou*, 402 F.3d 325 (No. 03-9186).

360. See Brief of the Secretary of Labor, Hilda L. Solis, as Amicus Curiae in Support of Plaintiff-Appellant at 11, *George*, 694 F.3d 812 (No. 11-3291); see also *Dept. of Housing and Urban Dev. v. Rucker*, 535 U.S. 125, 126 (2002) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)) (explaining that “‘the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind’”).

361. See Brief of the Secretary of Labor as Amicus Curiae in Support of Appellant for Reversal at 7, *Nicolaou*, 402 F.3d 325 (No. 03-9186).

362. See Brief for Secretary of Labor as Amicus Curiae Supporting Plaintiff-Appellant at 17-18, *George*, 694 F.3d 812 (No. 11-3291).

363. *Id.* at 17-18.

Most importantly, the Secretary of the Department of Labor argues that the recommendation for a broad interpretation is aligned with the purpose of ERISA and the Supreme Court's policy.³⁶⁴ Specifically, because ERISA is a remedial statute, "inquiry" should be broadly construed to protect unsolicited internal complaints since "[ERISA] should be liberally construed in favor of protecting the participants in employee benefit plans."³⁶⁵

B. PRINCIPLES OF SECTION 510'S STATUTORY CONSTRUCTION

The potential analysis of ERISA's anti-retaliation provision by the Supreme Court will begin with an examination of Section 510's statutory language.

Although legislative intent is not dispositive, the Supreme Court will likely consider the legislative intent of both Section 510 and ERISA. There is a presumption that "legislation reflects the will of the people, and a clearly expressed 'legislative intent' is consistent with the public's reasonable expectations."³⁶⁶ As previously discussed,³⁶⁷ ERISA was envisioned as a means of protecting pensions from tampering, mishandling or misuse.³⁶⁸ Additionally, whistleblowing anti-retaliation statutes are generally a means of employer accountability to "secure [a substantive right] by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the [Act]."³⁶⁹ In light of fiduciary duties, preemption, and civil

364. See *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1334-35 (holding that the anti-retaliation provision should be resolved in light of what is fair to employees); *Crawford v. Metro. of Nashville*, 255 U.S. 271, 278-79 (supporting the same proposition).

365. See *IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118, 127 (3d Cir. 1986).

366. 2A Sutherland Statutory Construction § 45:6 (7th ed.)

367. See *supra* Part I.A.

368. JAMES A. WOOTEN, *THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974* 1 (Univ. of Cal. Press 2005) ("ERISA was Congress' attempt to devise a comprehensive regulatory program to protect millions of American workers who looked to private pension plans for financial support in their retirement years").

369. *Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006).

remedies,³⁷⁰ it is clear that Congress designed Section 510 as an additional safeguard to hold employers accountable.³⁷¹

Additionally, the Supreme Court is likely to presume that Congress intends the statutory text to be read in accordance with its plain meaning, and that none of the enacted language is superfluous.³⁷² Thus, Congress's inclusion of both terms "inquiry" and "proceeding," rather than the single term "proceeding" included in the Fair Labor Standards Act Section 15(a)(3), indicates the intention "to give the nouns their separate, normal meanings" and go beyond the protection afforded by the FLSA.³⁷³ That, in conjunction with the broad range of prohibited retaliatory actions³⁷⁴ and the broad coverage of people,³⁷⁵ indicates the Congressional intent for ERISA to be construed broadly.

C. INADEQUACY OF STATE LAW REMEDIES

As discussed in Part I.B, the Supreme Court may take into account the amount of protection state laws afford whistleblowers when addressing what Section 510 protects.³⁷⁶ If ERISA does not protect internal complaints, federal courts will dismiss an internal complaint for a failure to state a claim upon which relief can be granted.³⁷⁷ Instead, employees will have to bring retaliation claims under state law, subject to a particular state's laws.³⁷⁸ However, due to ERISA preemption, such state claims are likely to be preempted from providing individuals

370. See *supra* Part I.B.

371. 29 U.S.C. § 1140.

372. *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004); *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

373. *Garcia v. United States*, 469 U.S. 70, 73 (1984).

374. 29 U.S.C. § 1140 (protecting against retaliatory actions such as discharging, fining, suspending, expelling or discriminating).

375. *Id.* (extending coverage to fiduciaries and beneficiaries).

376. *State Whistleblower Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/labor-and-employment/state-whistleblower-laws.aspx> (last visited Jan. 4, 2014).

377. See, e.g., *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 219 (3d Cir. 2010) (dismissing for failure to state a claim after holding that unsolicited internal complaints do not fall within ERISA).

378. See, e.g., *King v. Marriott Int'l Inc.*, 337 F.3d 421, 428 (4th Cir. 2003) (remanding after finding that claim was preempted by ERISA but that the employee's state law wrongful discharge claim was not entirely preempted).

appropriate relief.³⁷⁹ As demonstrated in *King*, because state whistleblowing statutes generally only protect external violation allegations, if Section 510 is read narrowly, employees will be unprotected for bringing forth unsolicited internal complaints.³⁸⁰

Most importantly, reserving remedies to the states is an inadequate solution due to the lack of conformity among state laws.³⁸¹ Because comprehensive whistleblower laws remain absent in many states,³⁸² the lack of broad ERISA Section 510 federal protection results in uneven whistleblower protection from state to state.³⁸³ Ultimately, this undermines the Congressional intent to protect benefit plans and structure ERISA as a comprehensive, uniform act.³⁸⁴

Thus, if applied broadly, Section 510 has greater potential to protect employees who suffer from employer retaliation than under state laws.³⁸⁵ Furthermore, if an employee is in a circuit that broadens ERISA protection to unsolicited internal complaints,³⁸⁶ the only remaining burden is to prove a causal connection exists between the lodged

379. See *supra* Part I.B.3.

380. See *King v. Marriott Int'l, Inc.*, 866 A.2d 895, 906 (Md. Ct. Spec. App. 2005) (rejecting Plaintiff's argument that her termination violated public policy and thus fell within the Maryland's at-will employment doctrine's public policy exception).

381. See generally ARIZ. REV. STAT. ANN. § 23-1501 at (A)(3)(c)(ii) (2012) (West) (protecting disclosures when the employee has reasonable belief of a violation); N.J. STAT. ANN. § 34:19-3(a)(1) (West 2006) (protecting employees who disclose or threaten to disclose a violation of law); CONN. GEN. STAT. ANN. § 31-51m(b) (West 2013) (protecting employees who report a violation or suspected violation orally or in writing); CAL. LAB. CODE § 1102.5(b) (West 2014) (protecting employees who disclose or may disclosed information).

382. See *State Whistleblower Statutes*, NATIONAL WHISTLEBLOWERS CENTER, http://www.whistleblowers.org/index.php?option=com_content&task=view&id=742&Itemid=161 (last visited Jan. 4, 2014).

383. See Trystan Phifer O'Leary, Note, *Silencing the Whistleblower: The Gap Between Federal and State Retaliatory Discharge Laws*, 85 IOWA L. REV. 663, 689 (2000).

384. See *supra* Part I.A.

385. See NATIONAL WHISTLEBLOWERS CENTER, *supra* note 382 (depicting the lack of general state whistleblower protection, and observing that only 17 of the 50 states provide a statutory cause of action protecting private sector whistleblowers from retaliatory discharge).

386. See *supra* Part II.B.1-3 (The Ninth, Fifth, and Seventh Circuits protect unsolicited internal complaints).

complaint and subsequent termination.³⁸⁷ Upon making a prima facie retaliation case, courts are deferential to the employee in considering whether to dismiss, even if the employer presents an appropriate, non-discriminatory reason for discharging.³⁸⁸ It seems that Section 510 would provide far more expansive protection to whistleblowing employees than standard state law anti-retaliation claims.³⁸⁹

D. WHISTLEBLOWING PROTECTION COMPARISON: STATE AND FEDERAL

It is important to note, however, that despite the existence of broad whistleblowing coverage in certain states, reserving remedies for states alone would lead to inadequate, parsed whistleblower protection from state to state.³⁹⁰

1. Comparing State Whistleblowing Laws

Unfortunately, most states have piece-meal whistleblower protections, which curtail whistleblower protection specifically to certain sectors of employment (usually public).³⁹¹ However, some states have adopted comprehensive Whistleblower Protection Acts for public and private employees including: Arizona,³⁹² California,³⁹³ Connecticut,³⁹⁴ Delaware,³⁹⁵ Florida,³⁹⁶ Hawaii,³⁹⁷ Illinois,³⁹⁸ Indiana,³⁹⁹

387. *Simons v. Midwest Tel. Sales and Serv., Inc.*, 462 F. Supp. 2d 1004, 1007-08 (D. Minn. 2006) (citing *Rath v. Selection Research, Inc.*, 978 F.2d 1087, 1090 (8th Cir. 1992)) (noting that claims brought under Section 510 undergo a three-step burden shifting framework analysis in which the plaintiff must first establish a prima facie case of retaliation by proving: (1) they participated in a statutorily protected activity; (2) an adverse employment action was taking against them; and (3) a casual connection existed between the two).

388. *See, e.g., Dunn v. Elco Enters., Inc.*, No. 05-71801, 2006 WL 1195867, at *9 (E.D. Mich. May 4, 2006) (instructing courts to exercise caution in dismissing once the employee has established a prima facie case).

389. *See* NATIONAL WHISTLEBLOWERS CENTER, *supra* note 382.

390. *See supra* Part III.B.

391. *See* NATIONAL WHISTLEBLOWERS CENTER, *supra* note 382.

392. ARIZ. REV. STAT. ANN. § 23-1501 (1995) (West).

393. CAL. LAB. CODE § 1102.5 (West 2012).

394. CONN. GEN. STAT. ANN. § 31-51m (West 2005).

395. DEL. CODE ANN. tit. 19 § 1703 (West 2013).

396. FLA. STAT. ANN. § 448.102. (West 2013).

397. 740 ILL. COMP. STAT. ANN. 174/15 (West 2002).

Maine,⁴⁰⁰ New Hampshire,⁴⁰¹ New Jersey,⁴⁰² North Dakota,⁴⁰³ Ohio,⁴⁰⁴ Rhode Island,⁴⁰⁵ and Tennessee.⁴⁰⁶

In understanding the breadth of these states' whistleblowing protections, we identify and categorize four categories.⁴⁰⁷ These four categories of protected whistleblowing conduct under state law are: (1) *Reporting to a public authority* (2) *Reporting to an in-progress investigation or proceeding* (3) *Reporting complaints in-house* and (4) *Objecting or refusing to participate*.⁴⁰⁸ In terms of the circuit dispute over protection afforded by Section 510,⁴⁰⁹ we are particularly interested in category (3) *Reporting complaints in house*, as all the cases brought before the Circuit Court of Appeals fall within this conduct category.⁴¹⁰

Many states' whistleblowing provisions explicitly protect unsolicited internal complaints made to a supervisor.⁴¹¹ In Arizona, the law protects disclosures when employees disclose "either [to] the employer or a representative of the employer who the employee reasonably believes is in a managerial or supervisory position and has the authority to investigate the information provided by the employee" ⁴¹² In Connecticut, whistleblowing protection is afforded when information "is provided to or the investigation is conducted by . . . a

398. 740 ILL. COMP. STAT. ANN. 174/15 (West 2002).

399. IND. CODE ANN. § 5-11-5.5-8 (West 2012).

400. ME. REV. STAT. ANN. tit. 26 § 833 (2015).

401. N.H. REV. STAT. ANN. § 275-E:2 (2009).

402. N.J. STAT. ANN. § 34:19-3 (West 2002).

403. N.D. CENT. CODE ANN. § 34-01-20 (2010).

404. OHIO REV. CODE ANN. § 4113.52 (West 2011).

405. R.I. GEN. LAWS ANN. § 28-50-3 (WEST 2008).

406. TENN. CODE ANN. § 50-1-304 (West 2011).

407. See, e.g., NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 376 (showing varying state whistleblowing statutes that can be arranged into four broad categories).

408. *Id.*

409. See *supra* Part II.

410. *Sexton v. Panel Processing*, 754 F.3d 332 (6th Cir. 2014); *George v. Junior Achievement of Cent. Ind., Inc.*, 694 F.3d 812 (7th Cir. 2012); *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217 (3d Cir. 2010); *King v. Marriott Int'l Inc.*, 337 F.3d 421 (4th Cir. 2003); *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325 (2d Cir. 2005); *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311 (5th Cir. 1994); *Hashimoto v. Bank of Haw.*, 999 F.2d 408 (9th Cir. 1993).

411. NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* 376.

412. ARIZ. REV. STAT. ANN. § 23-1501 at 3(c)(ii) (1995) (West) (emphasis added).

person with supervisory authority over the employee, or such other person working for the employer who has the authority to investigate, discover or terminate misconduct”⁴¹³ In Delaware, employees are protected if the retaliation occurs “[b]ecause the employee reports verbally or in writing *to the employer or the employee’s supervisor* a violation, which the employee knows or reasonably believes has occurred or is about to occur unless the employee knows or has reason to know that the report is false” (emphasis added).⁴¹⁴ Hawaii’s whistleblowing state laws affords protection if “the employee, or a person acting on behalf of the employee, reports or is about to report *to the employer . . .*” an alleged violation (emphasis added).⁴¹⁵ Maine also protects disclosures made to superiors if “[t]he employee, acting in good faith, or a person acting on behalf of the employee, reports orally or in writing to the *employer* or a public body” what the employee reasonably believes is a violation of a law or rule (emphasis added).⁴¹⁶ New Jersey state whistleblowing laws protect employees who “[disclose] or [threaten] to disclose to a *supervisor* or a public body an activity, policy or practice” that violates the law (emphasis added).⁴¹⁷ North Dakota broadly affords whistleblower protection to an “employee, or a person acting on behalf of an employee, [who] . . . reports a violation or suspected violation of federal, state, or local law, ordinance, regulation, or rule to *an employer*, a governmental body, or a law enforcement official”.⁴¹⁸ In Ohio, employees who reasonably believe a violation has occurred are protected from whistleblowing retaliation if “the employee orally [notifies] the *employee’s supervisor or other responsible officer of the employee’s employer*” (emphasis added).⁴¹⁹ Additionally Rhode Island whistleblowers are protected from retaliatory actions taken “[b]ecause the employee reports [a violation] verbally or in writing *to the employer or to the employee’s supervisor*” (emphasis added).⁴²⁰ Although most comprehensive state whistleblowing laws frame the protection with varying vocabulary and sentence structures, many offer

413. CONN. GEN. STAT. ANN. § 33-1336 (a) (West 2005).
414. DEL. CODE ANN. tit. 19, § 1703(4) (West 2013).
415. HAW. REV. STAT. § 378-62 (West 2008).
416. ME. REV. STAT. ANN. tit. 26, § 833(1)(A) (2005).
417. N.J. STAT. ANN. § 34:19-3(a) (West 2002).
418. N.D. CENT. CODE ANN. § 34-01-20 (1)(a) (2010) (emphasis added).
419. OHIO REV. CODE ANN. § 4113.52(A)(1)(a) (West 2011).
420. R.I. GEN. LAWS ANN. § 28-53-3(4) (West 2008).

employees protection if they are retaliated against for disclosing a violation to employers or superiors via an internal and unsolicited complaint.⁴²¹

The growing trend to extend broad whistleblower coverage is evident in the additional safeguards state laws have created to protect whistleblowing employees.⁴²² As mentioned earlier, the existence of category (4) *Objecting or refusing to participate* purposely remains silent on how or to whom the employee objects in order to work as a catch-all category. Indiana whistleblowing employees are protected if they have “objected to an act or omission.”⁴²³ In New Hampshire, the law prohibits retaliation measures if an employee “objects to or refuses to participate in any activity that the employee, in good faith, believes is a violation of the law.”⁴²⁴ Additionally, New Jersey whistleblowing laws protect an employee that “objects to, or refuses to participate in any activity, policy or practice which the employee reasonable believes” is a violation of law.⁴²⁵

The lack of whistleblowing uniformity is also evident among states that possess extensive coverage because each state employs unique means of protecting employee disclosures.⁴²⁶ For example, Hawaii’s extensive whistleblowing state laws protect not just the disclosure employees make, but also if an employee was “about to” make a disclosure.⁴²⁷ Thus, the statute uniquely protects those employees who are retaliated against before they even get an opportunity to make such a disclosure.⁴²⁸ Other states, like Florida, distinctively encourage and promote internal-organization solutions by requiring employees to disclose to employers in order to provide employers an opportunity to

421. NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 376

422. *Id.*

423. IND. CODE ANN. §5-11-5.5-8 (a)(1) (West 2012).

424. N.H. REV. STAT. ANN. § 275-E:2(I)(b) (2009).

425. N.J. STAT. ANN. § 34:19-3(c) (West 2002).

426. *See generally* HAW. REV. STAT. § 378-62(2) (West 2002) (providing whistleblower protection even before making a complaint); FLA. STAT. ANN. § 448.102(1) (West 1991) (requiring disclosure to supervisor or employer before qualifying for whistleblower protection). NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 376.

427. HAW. REV. STAT. § 378-62(2) (West 2008).

428. *Id.*

handle, address or rectify the complaint.⁴²⁹ Thus, the examination of broad whistleblowing state laws encourages a broad reading of Section 510 for two distinct reasons: (1) it highlights the growing national trend to protect whistleblowers and (2) it underscores that if protection is left solely to the states, whistleblowers will be afforded various levels of protection depending exclusively upon the state where the action is brought.

2. Comparison Federal Whistleblowing Laws: Fair Labor Standard Act

In determining the breadth of Section 510's protection, the circuits often refer to the Fair Labor Standard Act's anti-retaliation statute⁴³⁰ as a comparative tool.⁴³¹ Under the FLSA's whistleblowing provision: "It shall be unlawful for any person . . . (3) to 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 chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee."⁴³²

In 2011, the Supreme Court of the United States considered whether the FLSA anti-retaliation provision protected oral as well as written complaints in *Kasten v. Saint-Gobain Performance Plastics Corp.*⁴³³ The Supreme Court engaged in a broad purposivist analysis of anti-retaliation and whistleblowing provisions in *Kasten* in a manner that is pertinent and analogous to how Section 510 protection should be determined.⁴³⁴

Petitioner Kevin Kasten brought a retaliation claim under FLSA against his former employer Saint-Gorbain Performance Plastics

429. FLA. STAT. ANN. § 448.102(1) (West 2013).

430. 29 U.S.C. § 215(a)(3) (2012).

431. See generally *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 221-30 (3d Cir. 2010) (discussing the FLSA in the context of whistleblower protection); *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 327-29 (2d Cir. 2005) (discussing FLSA as a comparative tool); *King v. Marriott Int'l, Inc.*, 337 F.3d 421, 427-28 (4th Cir. 2003) (focusing on the language of FLSA).

432. 29 U.S.C. § 215(a)(3) (2012).

433. 131 S. Ct. at 1330.

434. *Id.* at 1331-36.

Corporation.⁴³⁵ Kasten alleged that Saint-Gorbain purposely located its time clocks between where employees removed their work-related gear and where they worked in order to prevent paying employees for the time spent putting and taking off their protective work gear.⁴³⁶ Because this was a clear violation of the FLSA, Kasten brought the time clock's location to Saint-Gobain's attention in accordance with the organization's internal grievance-resolution procedure.⁴³⁷ Kasten alleges he orally discussed that the location of the time clocks could be legally challenged as a violation to his shift supervisor, the human resources employee, the operations manager and the lead operator at Saint-Gobain.⁴³⁸ Due to the conflict among the Circuits regarding whether oral complaints are protected under the FLSA, the Supreme Court granted Kasten's petition certiorari.⁴³⁹

The *Kasten* court held that, under the FLSA, retaliation against an employee who "has filed any complaint" includes oral statements because "filed" sometimes refers to oral statements.⁴⁴⁰ The Court, however, reached this conclusion only after analyzing a variety of sources.⁴⁴¹ The Court looked to other anti-retaliation provision statutes despite their use of different language.⁴⁴²

First, it noted that some dictionary definitions of "filed" contemplate the medium of writing.⁴⁴³ However, other dictionary

435. *Id.* at 1329.

436. *Id.*

437. *Id.* at 1330.

438. *Id.*

439. *Id.* Compare *Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617, 625-36 (5th Cir. 2008) (anti-retaliation provision covers oral complaints), and *Lambert v. Ackerley*, 180 F.3d 997, 1007 (9th Cir. 1999) (en banc) (same), with *Lambert v. Genesee Hospital*, 10 F.3d 46, 55-56 (2d Cir. 1993), *abrogated by Kasten*, 131 S. Ct. 1325 (anti-retaliation provision does not cover complaints to supervisors). See also *Pacheco v. Whiting Farms, Inc.*, 365 F.3d 1199, 1206 (10th Cir. 2004) (anti-retaliation provision covers unofficial assertion of rights); *E.E.O.C. v. White & Son Enterprises*, 881 F.2d 1006, 1011-12 (11th Cir. 1989) (same); *Moore v. Freeman*, 355 F.3d 558, 562-63 (6th Cir. 2004) (assuming without discussion that oral complaints are covered); *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179, 181 (8th Cir. 1975) (same).

440. *Kasten*, 131 S. Ct. at 1329.

441. *Id.* at 1331-36.

442. *Id.* at 1332-33 (citing various anti-retaliation statutes).

443. *Id.* at 1331 (discussing WEBSTER'S NEW INTERNATIONAL DICTIONARY'S definition of "file").

meanings extend the definition to include oral material such as being included “into the order of business.”⁴⁴⁴ This is significant because the Court found the phrase “filed a complaint” was not limited to written complaints but broadened to encompass oral complaints.⁴⁴⁵

Moreover, although the language is broader than the phrase “filed any complaint,” the phrase itself linguistically applies to the broader oral-inclusive interpretation.⁴⁴⁶ The Court surmised that the use of this broader language elsewhere may indicate that Congress (1) wanted to limit the scope of the phrase to writing only, or (2) did not consider a different phraseology made a significant difference in the mediums of oral or writing.⁴⁴⁷

Additionally, the Court focused on the general usage of the term “file” by legislators, administrators, and judges.⁴⁴⁸ The Court acknowledged that state statutes often consider oral filings.⁴⁴⁹ Regulations promulgated by federal agencies sometimes permit complaints to be filed orally.⁴⁵⁰ Additionally, judges use the term “filed” to contemporaneously include written and oral mediums.⁴⁵¹ Thus, the Supreme Court considered the function and objective of the Act to determine the meaning of the FLSA phrase “filed any complaint.”⁴⁵²

The Supreme Court’s analysis of the FLSA phrase protecting employees who have “filed any complaint” acknowledged that the provision in isolation may be open to competing interpretations.⁴⁵³ However, the Court determined that only one interpretation is permissible when considering the purpose and context of the provision.⁴⁵⁴ The Court noted that the Act sought to prohibit “labor

444. *Id.* (discussing FUNK & WAGNALLS NEW DICTIONARY OF THE ENGLISH LANGUAGE’s definition of “file”).

445. *Id.*

446. *Id.* at 1333.

447. *Id.*

448. *Id.* at 1331.

449. *See id.* (citing various state statutes using the word “‘file’ in conjunction with oral statements”).

450. *See id.* at 1331-32 (citing examples of regulations permitting complaints to be filed orally).

451. *See id.* at 1332 (citing instances where courts acknowledged oral filings prior to the FLSA).

452. *Id.* at 1333-34.

453. *Id.* at 1330-31.

454. *Id.*

conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.”⁴⁵⁵ The anti-retaliation provision particularly makes the enforcement scheme effective by removing an employee’s “fear of economic retaliation” and allowing them to not “quietly . . . accept substandard conditions.”⁴⁵⁶ The Court questioned whether Congress would want to limit the effectiveness of the Act by only protecting the complaints provided in writing, thus effectively marginalizing illiterate, less educated or overworked workers.⁴⁵⁷ The Court especially recognized that Congress was influenced by President Roosevelt’s message that workers were in desperate need of an Act that could protect them.⁴⁵⁸ Thus, ultimately the Supreme Court’s decision suggests that when dealing with ambiguous anti-retaliation provisions, courts should strive to resolve the ambiguity in favor of the statute’s purpose.⁴⁵⁹

The Court noted that limiting the anti-retaliation provision solely to written complaints would negate the Act’s flexibility, ultimately preventing its effectiveness.⁴⁶⁰ It would prevent the implementation of hotlines, interviews or any other oral means of receiving complaints.⁴⁶¹ The Court also recognized and was persuaded by decisions and arguments articulated by the Secretary of the Department of Labor.⁴⁶² This encouraged courts to broadly construe the interpretation of anti-retaliation statutes to allow additional means by which an employee may

455. *Id.* at 1333.

456. *Id.* at 1333 (quoting *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960)).

457. *Id.* at 1333.

458. *Id.* (noting President Franklin Roosevelt had pointed out worker were in need of the Act’s help).

459. *See id.* at 1331 (“considering the provision in conjunction with the [statute’s] purpose and context leads us to conclude that only one interpretation is permissible”).

460. *Id.* at 1334.

461. *Id.*; *see Fair Labor Standards Act*, UNITED STATES DEPARTMENT OF LABOR, <http://www.dol.gov/compliance/laws/comp-flsa.htm> (last visited Sept. 18, 2014) (directing participants who wish to “file a complaint” to contact a local office “or call the Department’s Toll-Free Wage and Hour Help Line at 1-866-4-US-WAGE”).

462. *See Kasten*, 131 S. Ct. at 1335 (“The Secretary of Labor has consistently held the view that the words ‘filed any complaint’ cover oral, as well as written, complaints.”).

submit violations in order to promote, not curtail, the legislation's effectiveness.⁴⁶³

The Court did concede to Saint-Gobain's argument that the statute required fair notice.⁴⁶⁴ The Court, however, explained that it would be difficult for an employer, who is unaware an employee has made a complaint, to discriminate due to that complaint.⁴⁶⁵ Additionally, fair notice is not limited to writing.⁴⁶⁶ Furthermore, although the consulted sources (definitions, statutes, regulations, judicial opinions) grouped writing and oral statements, the term "filing" did indicate a serious occurrence.⁴⁶⁷ Thus, the court required that in order to fall under the anti-retaliation provisions protection, a complaint must be clear and detailed regardless of what medium it is presented in.⁴⁶⁸

E. OBSTACLE OF ACHIEVING A BROAD INTERPRETATION OF SECTION 510:
TEXTUALISM

The circuit split regarding Section 510's interpretation is likely to be resolved if the Supreme Court grants certiorari.⁴⁶⁹ Upon addressing the issue, some justices may find Justice Antonin Scalia, an avid proponent, legal theorist and practitioner of textualism, to be highly influential.⁴⁷⁰

Textualism proposes that the text is the starting point for all statutory interpretation and that one must follow the statutory plain meaning if the text is clear.⁴⁷¹ Textualists stress that legislative history should not be consulted, because the role of the judge is to be focused on applying the text of a statute, not deciphering the meaning and

463. *Id.* at 1336 ("We conclude that the Seventh Circuit erred in determining that oral complaints cannot fall within the scope of the phrase "'filed any complaint' in the Act's anti-retaliation provision.").

464. *Id.* at 1334.

465. *Id.*

466. *Id.*

467. *Id.* at 1333.

468. *Id.*

469. *See generally id.* at 1336 (resolving the circuit court split over FLSA's anti-retaliation clause by granting certiorari and holding oral complaints as protected).

470. William N. Eskridge, Jr., *Book Review: The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 532 (discussing the impact of Justice Scalia's position as a textualist).

471. *Id.*

purpose of it.⁴⁷² This textualist approach arises out of wariness of judicial activism; if the words themselves don't command the result, it is the legislature's, not judiciary's job to import that meaning.⁴⁷³

Textualists, like Scalia, criticize the approach some judges apply in interpreting the meaning and parameters of a statute.⁴⁷⁴ Although a broader expansionary interpretation may put into context the purpose of the provision and also harmonize the entire U.S. Code to solve a mischief, textualists fundamentally reject this approach.⁴⁷⁵ Unless said explicitly, Justice Scalia and other textualist justices will not force intent within the text because textualism employs a narrow approach to Congressional intent.⁴⁷⁶ Thus, textualists are fundamentally pitted against purposivists who focus their statutory interpretation on the purpose and intent of the enacted legislation.⁴⁷⁷ In his book *Reading Law*, Justice Scalia stresses the superiority of a textualist approach because otherwise judges will not refrain from reading their own values into the statutes whereas textualism places a rein on imputing personal judicial values.⁴⁷⁸

Justice Scalia passionately advocated and implemented this exact textualist interpretative approach in his *Kasten* dissent.⁴⁷⁹ Justice Scalia argued that the Supreme Court should affirm the Seventh Circuit's judgment for the employer on the grounds that Fair Labor Standards Act of 1938, 29 U.S.C. §215(a)(3) covers only written complaints.⁴⁸⁰ He criticizes the majority's examination of modern state and federal statutes, arguing that the only relevance of such provisions is that none of them achieves results by using the phrase "filed any complaint" in their language to include complaints, submitted to employers.⁴⁸¹

472. *Id.*

473. *Id.* at 533.

474. *Id.* at 532.

475. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 16 (2012).

476. *See Eskridge, supra* note 470, at 532.

477. *Id.* at 533.

478. SCALIA & GARNER, *supra* note 475, at 16.

479. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1336 (2011) (Scalia, J., dissenting).

480. *Id.* at 1336-67.

481. *Id.* at 1339. *See, e.g.*, 42 U.S.C. §2000e-3(a) (prohibiting retaliation against employees who "oppos[e] any [unlawful] practice").

Ultimately, Justice Scalia's dissent stresses that "[w]hile the jurisprudence of this Court has sometimes sanctioned a 'living Constitution,' it has never approved a living United States Code."⁴⁸² Therefore, Justice Scalia reasons that Congress's 1938 enactment must be applied based on the language of the text, not in accordance with what modern Congress (or this Court) would prefer.⁴⁸³

This Note has addressed such as the purpose of whistleblowing provisions and the foundational intent surrounding ERISA's enactment.⁴⁸⁴ Instead, textualists would simply refer to Section 510's language to decipher if it has plain meaning.⁴⁸⁵ If plain in meaning, the text will be applied as is, if not then textualists will seek to use that particular language's definitions and colloquialisms to decipher its meaning.⁴⁸⁶

A textualist approach removes all legislative history and purpose when considering a provision's correct interpretation.⁴⁸⁷ Justice Scalia stressed that, although the Secretary of Labor has the authority to issue regulations under the legislative provisions, they possess no authority in interpreting regulations or provisions.⁴⁸⁸ Justice Scalia would argue that providing any deference or consideration to the briefs submitted by the Secretary of the Department of Labor would be improper.⁴⁸⁹

Thus, even though granting certiorari would fundamentally resolve the split among circuits as to if Section 510 protects unsolicited internal complaints, such an interpretation may fail if there are enough Justices willing to embrace the textualist approach.⁴⁹⁰ Additionally, it is important to note that behind philosophical interpretations lurk policy preferences.⁴⁹¹

482. *Kasten*, 131 S. Ct. at 1339 (Scalia, J., dissenting).

483. *Id.*

484. *See supra* Part III.

485. *See Eskridge, supra* note 470, at 532.

486. *Id.*

487. *Kasten*, 131 S. Ct. at 1339-40 (Scalia, J., dissenting).

488. *Id.* at 1340.

489. *Id.*

490. Eskridge, *supra* note 470, at 532.

491. Michael A Bailey & Forrest Maltzman, *Does Legal Doctrine Matter? Unpacking Policy Preferences on the U.S. Supreme Court*, 102 AMERICAN POLITICAL SCIENCE REVIEW No. 3 (Aug. 2008.), available at http://faculty.georgetown.edu/baileyma/Bailey_Law_APSR2008.pdf (discussing the effect of personal policy preferences upon judicial voting).

**IV. SECTION 510 SHOULD PROTECT ALL WHISTLEBLOWING
COMPLAINTS, INCLUDING THOSE WHO SUBMIT UNSOLICITED
INTERNAL COMPLAINTS**

Part IV of this Note extends Section 510's future reach by proposing a judicial-based solution grounded in the inherent ambiguity and a legislative-based solution that would lead to a broader, protective reading. Then this part explores the adverse policy ramifications of limiting Section 510's protection to not cover unsolicited internal complaints. This part concludes with the consideration of the various policy and social benefits Section 510 would provide if its protection were not limited by any requirement of formality or solicitation.

A. JUDICIAL CONFLICT SOLUTION: AMBIGUITY

The conflict among the seven circuits about whether unsolicited internal complaints are protected inherently reveals the ambiguity of Section 510.⁴⁹² The Fifth, Seventh and Ninth Circuits endorse a broad reading of Section 510 to include unsolicited internal complaints under the federal anti-retaliation remedies available to whistleblowers.⁴⁹³ On the other hand, the Second, Third, Fourth and Sixth Circuits have denied unsolicited internal complaints relief under ERISA, leaving employees to find remedies under state law.⁴⁹⁴ Since *Kasten* does not provide decisive instruction, the Supreme Court should grant certiorari in order to explicitly resolve the circuit split,⁴⁹⁵ and instruct that ambiguous anti-retaliation statutes, like Section 510, must be resolved in favor of employees.⁴⁹⁶ This will re-establish an equal level of protection for whistleblowing employees of all the United States circuits, regardless of what form or to whom they disclose alleged ERISA complaints.⁴⁹⁷

492. See *supra* Part II.A.

493. See *supra* Part II.B for discussion of circuits that protect internal, unsolicited internal complaints.

494. See *supra* Part II.C for discussion of circuits that deny protecting unsolicited internal complaints; see also *supra* Part III.C for discussion of limited remedies available under state law wrongful discharge causes of action.

495. See *supra* Part II.D.

496. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1331 (2011); *Crawford v. Metro. of Nashville*, 555 U.S. 271, 278-79 (2009).

497. *Kasten*, 131 S. Ct. at 1331 (2011); *Crawford*, 555 U.S. at 278-79.

B. LEGISLATIVE CONFLICT SOLUTION: 'INTERNAL OR EXTERNAL' AND
'SOLICITED OR UNSOLICITED'

Although the Supreme Court may resolve the conflict, Congress should also amend ERISA to provide unambiguous protection to all whistleblowers that submit alleged ERISA violations, regardless of how or to whom they complain.⁴⁹⁸ Solving the conflict between internal and external could be simply accomplished by editing Section 510 to protect:

Any person who gives solicited or unsolicited information internally or externally or is solicited or unsolicited to testify or about to testify in any internal or external inquiry or proceeding relating to ERISA.

The addition of these phrases promptly clarifies that Section 510 protects all complaints, whether internal or external and/or solicited or unsolicited.⁴⁹⁹ It will also adhere to the rationale put forth by the Secretary of Labor and the Ninth Circuit, and recognize that a complaint lodged by an employee, even internally, is protected as the first step in an "inquiry or proceeding."⁵⁰⁰ Such an interpretation is consistent with the purpose of Section 510,⁵⁰¹ protects the Department of Labor's interests,⁵⁰² aligns with Supreme Court's recent FLSA whistleblowing decision in *Kasten*,⁵⁰³ avoids the unequal protection of whistleblowers via circuit jurisdictions or via state whistleblowing laws,⁵⁰⁴ and works in conjunction with the growing state and federal trend to protect whistleblowers⁵⁰⁵ in an effort in increase disclosure, transparency and accountability.⁵⁰⁶

498. *Kasten*, 131 S. Ct. at 1331 (2011); *Crawford*, 555 U.S. at 278-79.

499. *See supra* Part II.

500. *See supra* Part III.A and Part II.B.1.

501. *See supra* Part I.C.

502. *See supra* Part III.A.

503. *See supra* Part III.C.2.

504. *See supra* Part III.C.1.

505. *See supra* Part III.C.

506. *See supra* Part I.B.

C. ADVERSE RAMIFICATIONS OF APPLYING A NARROW INTERPRETATION

If implemented, a narrow approach would yield significant and far-reaching adverse ramifications.⁵⁰⁷ Excluding unsolicited internal complaints will discourage employees from reporting employer's ERISA violations, undermining the purpose of Section 510.⁵⁰⁸ Should employees decide to stay silent as a result, ERISA's primary enforcement method would fail and ultimately obstruct Congress's intention to ensure accountability.⁵⁰⁹ Additionally, if the law limits participants and beneficiaries from using reporting mechanisms, the protective force of the whistleblowing provision will weaken.⁵¹⁰ Moreover, this interpretation would encourage managers to simply fire whistleblowers before enough information could be solicited to initiate formal inquiry or proceeding.⁵¹¹

Overall, the narrow interpretation would damage an organization's communication and efficiency in solving existing problems internally, because whistleblowers would be forced to take the more drastic step and immediately go directly to the public or an external governing party to disclose alleged violations.⁵¹² This contravenes established congressional goals because it would prevent an organization from conducting a cost-effective internal inquiry or resolution of the merits of a complaint.⁵¹³

507. See, e.g., Brief for the Secretary of Labor as Amicus Curiae in Support of Appellant for Reversal at *10, *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217 (3d Cir. 2010) (No. 09-3198), (explaining the widespread ramifications of adopting a narrow interpretation of Section 510).

508. *Id.* at *23.

509. *Id.* at *22-23.

510. *Id.* at *22.

511. *Id.* at *10.

512. See e.g., Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiff Appellant for Reversal at *17, *Sexton v. Panel Processing, Inc.*, 754 F.3d 332 (6th Cir. 2014) (No. 13-1604) (explaining organizational ramifications of adopting a narrow approach).

513. *Id.* at *17; see also *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1334 (2011) (not protecting internal complaints "discourage[s] the use of desirable informal workplace grievance procedures").

D. SOCIETAL AND POLICY BENEFITS OF APPLYING A BROAD
INTERPRETATION

Even when setting aside the overwhelming support for a broad interpretation of Section 510,⁵¹⁴ extending Section 510 protection to unsolicited internal employee complaints provides many extrinsic benefits.

A broad interpretation would encourage the key policy of encouraging internal complaints as they are often the most effective and direct way to bring forth an objection on an issue requiring attention.⁵¹⁵ Protecting and encouraging internal complaints would validate grievance procedures and provide supervisors an internal opportunity to remedy or address the validity of the objection before outside parties became involved.⁵¹⁶ This allows Section 510 to stay true to its protective purpose,⁵¹⁷ especially since the weakening of other ERISA provisions—civil remedies⁵¹⁸ and preemption⁵¹⁹—undermine remedies,⁵²⁰ which mandate employer accountability to uphold their fiduciary duties.⁵²¹ Additionally, a broader interpretation provides the flexibility to allow organizations to solve issues internally without the added pressures of negative publicity, legal costs, reputational harm, and drop in company stock price that accompanies external whistleblowing disclosures.⁵²²

The arguments, which opponents of a broad Section 510 interpretation put forth, as articulated by the Second, Third, Fourth and Sixth Circuit's decisions, are far-reaching and unpersuasive.⁵²³ Such

514. See *supra* Part III.

515. Terry Morehead Dworkin & Melissa S. Baucus, *Internal vs. External Whistleblower: A Comparison of Whistleblowing Processes*, 17 J. BUS. ETHICS 1281, 1297 (1998).

516. *Kasten*, 131 S. Ct. at 1334.

517. See *supra* Part I.C.

518. See *supra* Part I.B.2.

519. See *supra* Part I.B.3.

520. See *supra* Part I.B.

521. See *supra* Part I.B.4.

522. Robert M. Bowen, et. al., *Whistle-Blowing: Target Firm Characteristics and Economic Consequences*, 85 ACCT. REV. 1239, 1250-55 (2010).

523. *Sexton v. Panel Processing, Inc.*, 754 F.3d 332, 334-35 (6th Cir. 2014); *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 223 (3d Cir. 2010); *Nicolau v. Horizon Media, Inc.*, 402 F.3d 325, 330 (2d Cir. 2005); *King v. Marriott Int'l Inc.*, 337 F.3d 421, 427 (4th Cir. 2003).

opponents argue the inclusion of unsolicited internal complaints would cause Section 510 to be evoked liberally.⁵²⁴ Specifically, protecting unsolicited internal complaints would “tip the balance of ERISA” and jeopardize employer’s prerogative to make legitimate business judgment decisions.⁵²⁵ Additionally, proponents of a narrow interpretation argue that embracing a broad protection would essentially “create ‘tenure for all employees who deal with ERISA related issues, including bookkeepers, human resource personnel, in house counsel, and health insurance brokers, etc. and would harm the corporation’s ability to make legitimate business decisions.’”⁵²⁶ However, these arguments are unconvincing and overreaching because employees who alleged Section 510 retaliation claims must still prove a prima facie case of retaliation.⁵²⁷

Even if courts broadly construe Section 510, plaintiffs must establish a prima facie case of retaliation or interference by showing “that (1) he participated in a protected activity . . . (2) he suffered an adverse employment action, and (3) there is a causal connection between the two events.”⁵²⁸ Even when a plaintiff establishes a prima facie case for retaliation, if the employer articulates a legitimate, non-discriminatory reason for its action, the burden again shifts back to the plaintiff to prove that the proffered reason is not pretextual.⁵²⁹ Because the burden remains upon plaintiffs, Section 510 should be broadly interpreted to include unsolicited internal complaints.

CONCLUSION

As a key safeguard in holding employers accountable to their fiduciary duties, it is exceptionally important that Section 510 of ERISA

524. See Brief for Appellee at *14, *A.H. Cornell*, 610 F.3d 217 (No. 09-3198), 2009 WL 6870705.

525. *Id.*

526. Brief for the Appellees at *14, *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217 (3d Cir. 2010) (No. 09-3198) (arguing the dangers of including unsolicited internal complaints within Section 510).

527. See *Simons v. Midwest Tel. Sales & Serv., Inc.*, 462 F. Supp. 2d 1004, 1007-08 (D. Minn. 2006) (quoting *Rath v. Selection Research, Inc.*, 978 F.2d 1087, 1090 (8th Cir. 1992)).

528. See *Sturge v. Northwest Airlines, Inc.*, 600 F. Supp. 2d 1040, 1044 (D. Minn. 2009).

529. See *Rath*, 978 F.2d at 1090.

protect all individuals who allege any violations, regardless of the complaint's form. To do so truly promotes the intention, purpose and protection of ERISA. Barring unsolicited internal complaints, however, would alienate or harm vulnerable individuals who faithfully report alleged violations only to be retaliated against with no redress—all simply due to the form of their complaint. Moreover, the additional modes of communication and internal investigations advanced by broadening protection to internal, unsolicited internal complaints would quickly eliminate baseless complaints and allow corporations to solve unintentional oversights without external interference. In reference to the persisting circuit conflict, this Note offers both a judicial and congressional based solution to expand Section 510's protective reach to unsolicited internal complaints. Either of these approaches will successfully broaden Section 510's scope for all circuits and ultimately will safeguard employee benefits, promote disclosures, facilitate internal solutions and continue to keep employers accountable.