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## Protecting the ERISA Whistleblower: The Reach of Section 510 of ERISA

Adam B. Gartner

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# PROTECTING THE ERISA WHISTLEBLOWER: THE REACH OF SECTION 510 OF ERISA

Adam B. Gartner\*

*Congress passed the Employee Retirement Income Security Act of 1974 (ERISA) to ensure the protection of private employee benefits. In doing so, Congress created uniform national standards for the administration of private employee benefit plans. Section 510 of ERISA affords some protection to whistleblowers who report ERISA violations. There is uncertainty, however, about whether section 510 protects a whistleblower who complains directly to his or her employer, or whether protection is limited to an individual who makes a report externally. Some circuit courts have held that section 510 protects all ERISA whistleblowers, while others have held that section 510's protections are more limited. This Note considers the history of ERISA and of whistleblower laws, addresses the circuit split over the reach of section 510's whistleblower protection provisions, and proposes an interpretation of section 510 that would provide broad protection to ERISA whistleblowers.*

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#### INTRODUCTION

Leslie Boran was the controller of the Royal Poinciana Golf Club in Naples, Florida.<sup>1</sup> In early 2010, she alerted the Club's board of trustees that they were violating the Employee Retirement Income Security Act of 1974 (ERISA).<sup>2</sup> She demanded that they correct the violations and report them to the government.<sup>3</sup> Specifically, Boran told the trustees that the company's 401(k) plan was wrongfully charging employees an administrative fee and that the Club was wrongfully failing to consider holiday bonuses as income to be matched under the 401(k) plan.<sup>4</sup> In March 2010, Boran returned from vacation to present the annual financial report at the Club's board meeting.<sup>5</sup> Before she had a chance to present the report, Boran was arrested for trespassing and thrown in jail.<sup>6</sup> The Club had fired Boran while she was on vacation and barred her from the premises.<sup>7</sup> Boran

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1. Aisling Swift, *Naples CPA Contends Blowing Whistle Got Her Fired*, NAPLES DAILY NEWS, Mar. 21, 2010, <http://www.naplesnews.com/news/2010/mar/21/naples-cpa-contends-blowing-whistle-got-her-fired>.

2. Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461 (2006 & Supp. III 2009) and scattered sections of 26 U.S.C.).

3. Swift, *supra* note 1.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* The club claimed that Boran resigned on February 22, 2010, and was not actually fired. *Id.* Boran disputed this claim. *Id.*

asserted that she was fired because she reported the alleged ERISA violations to the trustees.<sup>8</sup>

Private employee benefit funds, which control trillions of dollars in assets,<sup>9</sup> have not been immune to corruption. The Teamsters' Central States Pension Fund is still under federal oversight due to corruption and fraud in the 1960s and 1970s.<sup>10</sup> More recently, in 2009, a benefits administrator for the Sandhogs Union in New York City was charged with embezzling \$42 million from the Union's benefit funds over a seven-year period.<sup>11</sup>

What recourse would Boran, or any employee who discovered ongoing violations, have if he or she were terminated for internally reporting ERISA violations? The answer is not clear based on the current state of ERISA case law.

Passed by Congress in 1974, ERISA drastically altered the relationship between the federal government and private employee benefit plans and turned the regulation of private employee benefit plans into an exclusively federal matter.<sup>12</sup> ERISA is also considered one of the most complicated and confusing federal statutes to navigate, with many sections still being judicially interpreted today.<sup>13</sup>

Still under consideration is section 510 of ERISA.<sup>14</sup> Section 510 protects individuals from employer retaliation for certain activities.<sup>15</sup> One such activity that section 510 protects is whistleblowing.<sup>16</sup> A "whistleblower" is an individual who seeks to change current practices by revealing information about the behavior or practices.<sup>17</sup> The protection of whistleblowers is considered vital to a "democratic, free enterprise system."<sup>18</sup> Some whistleblowers have received national attention for their acts, such as in 2002, when Time Magazine named "the Whistleblowers" as

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8. *Id.*

9. See EMP. BENEFIT RESEARCH INST., ASSETS IN QUALIFIED RETIREMENT PLANS, 1985–2002: REVISED, available at <http://www.ebri.org/pdf/publications/facts/0904fact.pdf>.

10. See Mary Williams Walsh, *Teamsters Find Pensions at Risk*, N.Y. TIMES, Nov. 15, 2004, at A1.

11. Russ Buettner, *Woman Stole from Union, Charges Say*, N.Y. TIMES, Dec. 2, 2009, at A32.

12. See Dennis K. Schaeffer, Comment, *Insuring the Protection of ERISA Plan Participants: ERISA Preemption and the Federal Government's Duty to Regulate Self-Insured Health Plans*, 47 BUFF. L. REV. 1085, 1090 (1999).

13. See, e.g., *Conkright v. Frommert*, 130 S. Ct. 1640, 1644 (2010) (noting that the facts in most ERISA matters are "exceedingly complicated"); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993) (ERISA is an "enormously complex and detailed statute"); *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980) (describing ERISA as a "comprehensive and reticulated statute").

14. 29 U.S.C. § 1140 (2006). The text of this Note will refer to ERISA provisions by the original section number within ERISA, as opposed to the section number in the United States Code.

15. See *id.*; see also *infra* Part I.C (describing the protections that section 510 provides).

16. 29 U.S.C. § 1140.

17. MARCIA P. MICELI & JANET P. NEAR, *BLOWING THE WHISTLE* 15 (1992).

18. See *Winters v. Hous. Chronicle Publ'g Co.*, 795 S.W.2d 723, 730 (Tex. 1990) (Doggett, J., concurring).

its Persons of the Year.<sup>19</sup> Despite this national admiration for whistleblowers, there is still much confusion about whether section 510 applies to internal complaints made by an employee to an employer, or whether it applies only to external complaints made to an outside agency.<sup>20</sup>

This Note addresses the unresolved circuit split over the reach of ERISA's whistleblower protection provisions. Part I of this Note provides an overview of the history of ERISA and of whistleblower laws generally, and explains some of the key provisions of ERISA. Part II details the circuit split over whether section 510 of ERISA applies to internal whistleblower complaints. Part III endorses an interpretation of section 510 that would provide the greatest level of protection for ERISA whistleblowers.

## I. BACKGROUND OF ERISA AND WHISTLEBLOWER LAWS

An appreciation of the basic framework of ERISA and its goals is necessary to understand how courts interpret ERISA. First, this part chronicles ERISA's passage and details key elements of ERISA's regulatory framework, specifically its fiduciary protection policies, its civil enforcement regime, and ERISA preemption. Next, this part provides background on whistleblower protection laws, and contrasts state and federal whistleblower protection. Finally, this part gives a detailed overview of section 510 of ERISA.

### A. *An Overview of ERISA*

This section first provides a summary of the events leading to ERISA's passage. Next, it describes the type of employee benefit plans to which ERISA applies. Then, this section explains three important parts of ERISA: fiduciary responsibility, civil enforcement, and preemption.

#### 1. The Road to ERISA

The Studebaker Corporation's closure of its automotive plant in South Bend, Indiana in December 1963 was perhaps the major impetus for the passage of ERISA.<sup>21</sup> When the plant closed, Studebaker's pension plan lacked the funds to pay the workers their full pensions.<sup>22</sup> In the years following the Studebaker plan's failure, both Congress and the public questioned why the Studebaker plan was underfunded.<sup>23</sup> Some

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19. See generally Richard Lacayo & Amanda Ripley, *Persons of the Year*, TIME, Dec. 30, 2002–Jan. 6, 2003, at 30.

20. See *infra* Part II.

21. See JAMES A. WOOTEN, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY 51 (2004); Kermit J. Berylson, *ERISA Revolutionizes the Pension Field*, CPA J., Apr. 1977, at 23, 23; Philip Shabecoff, *Washington and Business: ERISA—Still 5-Letter Word for Trouble*, N.Y. TIMES, Sept. 8, 1977, at D1.

22. WOOTEN, *supra* note 21, at 51; Landon Wade Magnusson, Note, *Golden Gate and the Ninth Circuit's Threat to ERISA's Uniformity and Jurisprudence*, 2010 BYU L. REV. 167, 168.

23. WOOTEN, *supra* note 21, at 51.

commentators claimed that company officials misused the pension plan's funds,<sup>24</sup> while others, such as Congressman John Dent of Pennsylvania, claimed that the "company had redirected its pension funds toward new acquisitions."<sup>25</sup> In actuality, the plan failed because of its funding structure, as opposed to any nefarious scheme.<sup>26</sup> Studebaker and the United Auto Workers had agreed to a pension plan funding formula that exposed younger employees to greater risk that the pension plan would default.<sup>27</sup> Whatever the reason behind the Studebaker plan's failure, the reality was that the workers lost their pensions.<sup>28</sup>

Congress kept the Studebaker plan's failure in mind over the ensuing decade as it proceeded to draft ERISA.<sup>29</sup> After years of debate in Congress, on September 2, 1974—Labor Day—President Gerald Ford signed ERISA into law.<sup>30</sup> Prior to ERISA, the determination of the amount of risk in private pension plans was typically left to the contracting parties.<sup>31</sup> ERISA completely changed this by making it federal policy to provide security for private pension plans.<sup>32</sup>

ERISA's main goals were promoting proper management of benefit fund finances, preventing mismanagement and abuse, protecting participants' pensions, preserving substantial employer control over plan sponsorship, and creating uniform national standards for the governance of private pension plans.<sup>33</sup> While ERISA did not require private companies to provide benefits, it did create a framework to help provide protection to private benefit plan participants.<sup>34</sup>

## 2. What ERISA Covers

ERISA applies to pension benefit plans and welfare benefit plans.<sup>35</sup> Pension benefit plans are plans that defer income until retirement or termination of employment, or provide retirement income to participants.<sup>36</sup>

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24. *Id.*

25. *Id.*

26. *Id.* at 51–52.

27. *Id.* at 52–53.

28. *See id.* at 51–53.

29. *See, e.g.,* Robert E. Dallos, *Pension Funds: Congress to Study Tighter Regulations*, N.Y. TIMES, Nov. 28, 1966, at 63; Michael C. Jensen, *Pension Revisions Expected in 1972*, N.Y. TIMES, Aug. 1, 1971, at 72; Michael C. Jensen, *Pensions Under Fire*, N.Y. TIMES, June 27, 1971, at F1; David E. Rosenbaum, *Pension Reform Measure Voted by House, 375 to 4*, N.Y. TIMES, Mar. 1, 1974, at 1.

30. *See* Bruce F. Spencer, *1966–1975: The Decade of ERISA*, EMP. BENEFIT PLAN REV., Mar. 1996, at 54, 54–55.

31. WOOTEN, *supra* note 21, at 3.

32. *See* *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90–91 (1983); WOOTEN, *supra* note 21, at 3.

33. *See* PETER J. WIEDENBECK, *ERISA: PRINCIPLES OF EMPLOYEE BENEFIT LAW* 14 (2010); WOOTEN, *supra* note 21, at 4–5.

34. *See* *Shaw*, 463 U.S. at 91.

35. *See* 29 U.S.C. § 1002 (2006); WIEDENBECK, *supra* note 33, at 5.

36. 29 U.S.C. § 1002(2)(A); WIEDENBECK, *supra* note 33, at 6.

Welfare benefit plans include certain employee health benefit, life insurance, and disability insurance plans.<sup>37</sup>

ERISA does not require employers to provide any specific employee benefits; rather, it sets standards that plan sponsors must follow when they choose to provide benefits.<sup>38</sup> ERISA provides guidelines for, among other things, vesting,<sup>39</sup> plan funding,<sup>40</sup> and fiduciary standards.<sup>41</sup>

ERISA applies to two main types of pension benefit plans: defined contribution plans and defined benefit plans.<sup>42</sup> A defined contribution plan is a plan in which the employer and/or participant contributes to an individual account on the participant's behalf.<sup>43</sup> The contributions are then invested on the participant's behalf, and the participant eventually receives the balance in the account.<sup>44</sup> Some examples of defined contribution plans are 401(k) plans, 403(b) plans, employee stock ownership plans, and profit-sharing plans.<sup>45</sup> A defined benefit plan is any type of deferred compensation program that is not a defined contribution plan.<sup>46</sup> With a defined benefit plan, a participant is guaranteed certain benefits at retirement based on a set formula.<sup>47</sup> Factors that can influence the ultimate level of benefits include length of service, compensation level, and age.<sup>48</sup> The employer is obligated to pay benefits at the promised level—if the plan lacks the funds, the employer must make up the difference.<sup>49</sup>

ERISA also created the Pension Benefit Guaranty Corporation (PBGC) to insure defined benefit pension plans.<sup>50</sup> After the Studebaker failure, union leaders pushed for a "pension reinsurance" program to protect workers if a fund defaulted on its obligations.<sup>51</sup> The PBGC is intended to ensure that defined benefit pension plans are able to pay out retirement

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37. See 29 U.S.C. § 1002(1); WIEDENBECK, *supra* note 33, at 5–6.

38. WIEDENBECK, *supra* note 33, at 18–19.

39. See 29 U.S.C. § 1053 (2006 & Supp. III 2009).

40. See *id.* §§ 1082–1085 (Supp. III 2009).

41. See *id.* § 1104 (2006 & Supp. III 2009).

42. See *id.* § 1002(34)–(35) (2006); see also WIEDENBECK, *supra* note 33, at 7.

43. See 29 U.S.C. § 1002(34); see also WIEDENBECK, *supra* note 33, at 7; *Frequently Asked Questions About Pension Plans and ERISA*, U.S. DEP'T OF LABOR, [http://www.dol.gov/ebsa/faqs/faq\\_compliance\\_pension.html](http://www.dol.gov/ebsa/faqs/faq_compliance_pension.html) [hereinafter *FAQs About ERISA*] (last visited Sept. 21, 2011).

44. WIEDENBECK, *supra* note 33, at 7; *FAQs About ERISA*, *supra* note 43.

45. WIEDENBECK, *supra* note 33, at 7–8; *FAQs About ERISA*, *supra* note 43.

46. 29 U.S.C. § 1002(35); WIEDENBECK, *supra* note 33, at 7; *FAQs About ERISA*, *supra* note 43.

47. See WIEDENBECK, *supra* note 33, at 7; Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 *YALE L.J.* 451, 455 (2004); *FAQs About ERISA*, *supra* note 43.

48. See WIEDENBECK, *supra* note 33, at 7; Zelinsky, *supra* note 47, at 456.

49. See WIEDENBECK, *supra* note 33, at 7; Zelinsky, *supra* note 47, at 456.

50. PENSION BENEFIT GUAR. CORP., *A PREDICTABLE, SECURE PENSION FOR LIFE: DEFINED BENEFIT PENSIONS* (2000), available at [http://www.pb.gc.gov/documents/A\\_Predictable\\_Secure\\_Pension\\_for\\_Life.pdf](http://www.pb.gc.gov/documents/A_Predictable_Secure_Pension_for_Life.pdf).

51. See WOOTEN, *supra* note 21, at 52; Bernard Shakin, *Tough on Fiduciaries*, *BARRON'S NAT'L BUS. & FIN. WKLY.*, Dec. 16, 1974, at 11; see also *supra* Part I.A.1 (discussing the Studebaker failure).

benefits when they come due.<sup>52</sup> The PBGC monitors the health of defined benefit pension funds, and, in the event a plan terminates without sufficient funds to pay all benefits, the PBGC pays out pension benefits to participants.<sup>53</sup> The PBGC only insures defined benefit funds; it does not insure defined contribution funds.<sup>54</sup> Employers who sponsor defined benefit plans pay premiums at a rate set by Congress to fund the PBGC,<sup>55</sup> and the PBGC also maintains a \$100 million line of credit with the United States Treasury.<sup>56</sup> The PBGC does not receive any taxpayer funds, but recent concerns over pension plan funding have led to concerns that taxpayer support, or a “taxpayer bailout,” may be necessary.<sup>57</sup>

### 3. ERISA Fiduciary Responsibility

This section describes ERISA’s fiduciary conduct standards. As will be discussed in Part II of this Note, ERISA’s fiduciary conduct standards play an important role in determining the reach of section 510.<sup>58</sup>

ERISA requires that benefit plans identify “one or more named fiduciaries who . . . shall have authority to control and manage the operation and administration of the plan.”<sup>59</sup> ERISA defines a fiduciary not just formally but also functionally<sup>60</sup>: an individual may become a fiduciary by being named a fiduciary, or based on functions the individual performs with respect to the plan.<sup>61</sup> A person who exercises “discretionary control or authority over the plan’s management, administration, or assets” becomes a fiduciary by virtue of performing those functions.<sup>62</sup>

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52. See 29 U.S.C. § 1302(a) (2006); Michael Barbanell Landres, Note, *Smoke, Mirrors, and ERISA: The False Illusion of Retirement Income Security*, 40 LOY. L.A. L. REV. 1169, 1182–83 (2007); *Major Provisions of the Pension Bill Signed by Ford*, N.Y. TIMES, Sept. 3, 1974, at 24.

53. See 29 U.S.C. § 1302; *General FAQs About PBGC*, PENSION BENEFIT GUAR. CORP., <http://www.pbgc.gov/about/faq/pg/general-faqs-about-pbgc.html> (last visited Sept. 21, 2011).

54. See *General FAQs About PBGC*, *supra* note 53.

55. 29 U.S.C. § 1306 (2006 & Supp. III 2009).

56. *Id.* § 1305 (2006).

57. See, e.g., Javier Hernandez, *Bill Would Extend Time to Fund Pension Plans*, N.Y. TIMES, Oct. 30, 2009, at B4; Editorial, *The UAW’s Defined Benefactor*, WALL ST. J., July 25–26, 2009, at A12; Alex J. Pollock, *The Next Big Bailout?*, WASH. POST (Apr. 20, 2006, 12:00 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2006/04/19/AR2006041901967.html>.

58. See *infra* Part II.

59. 29 U.S.C. § 1102(a)(1). A “named fiduciary” is either a fiduciary who is named in the plan document, or is identified as a fiduciary by the employer organization. *Id.* § 1102(a)(2).

60. 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); WIEDENBECK, *supra* note 33, at 111–13.

61. See 29 U.S.C. § 1002(21)(A); ERISA FIDUCIARY LAW, *supra* note 60, at 12–14; WIEDENBECK, *supra* note 33, at 111–13.

62. See *Mertens*, 508 U.S. at 251; see also 29 U.S.C. § 1002(21)(A); ERISA FIDUCIARY LAW, *supra* note 60, at 12–13; WIEDENBECK, *supra* note 33, at 112.

Section 404(a) of ERISA lays out the responsibilities of an ERISA fiduciary.<sup>63</sup> A fiduciary must act “solely in the interest of the participants and beneficiaries” of the plan.<sup>64</sup> Inherent in this requirement are the four main responsibilities of the fiduciary.<sup>65</sup> First, the fiduciary must act “for the exclusive purpose” of providing benefits to plan participants and beneficiaries and of defraying reasonable expenses in administering the plan.<sup>66</sup> Second, a fiduciary must act “with the care, skill, prudence, and diligence under the circumstances then prevailing that 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.”<sup>67</sup> Third, the fiduciary must ensure that the plan’s assets are sufficiently diversified to minimize the risk of loss.<sup>68</sup> Fourth, a fiduciary must act in accordance with the plan document and other plan governing instruments, as long as they do not violate ERISA.<sup>69</sup>

A fiduciary has the duty to review plan investments and plan actions to ensure that they comply with the plan document and with ERISA’s regulations.<sup>70</sup> Whether or not a fiduciary fulfills this duty is judged based upon how someone with expertise in an area would act, and a fiduciary’s lack of expertise in an area will not exempt a fiduciary from the requirements set forth in section 404(a).<sup>71</sup>

In certain instances an ERISA fiduciary may have a duty to disclose information to plan participants.<sup>72</sup> In *Varity Corp. v. Howe*,<sup>73</sup> the U.S. Supreme Court held that lying to participants is “inconsistent with the duty of loyalty owed by all fiduciaries.”<sup>74</sup> Additionally, some circuit courts have held that a fiduciary has a duty to disclose if a plan is “serious[ly] consider[ing]” benefit plan changes that could or might affect participants’ retirement decisions.<sup>75</sup> Statutorily, ERISA plan administrators must furnish

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63. See 29 U.S.C. § 1104(a).

64. *Id.* § 1104(a)(1).

65. See *id.* § 1104(a)(1)(A)–(D).

66. *Id.* § 1104(a)(1)(A); see ERISA FIDUCIARY LAW, *supra* note 60, at 31–32; WIEDENBECK, *supra* note 33, at 120.

67. 29 U.S.C. § 1104(a)(1)(B); see ERISA FIDUCIARY LAW, *supra* note 60, at 32; WIEDENBECK, *supra* note 33, at 120.

68. 29 U.S.C. § 1104(a)(1)(C); see ERISA FIDUCIARY LAW, *supra* note 60, at 32; WIEDENBECK, *supra* note 33, at 120.

69. 29 U.S.C. § 1104(a)(1)(D); see ERISA FIDUCIARY LAW, *supra* note 60, at 33; WIEDENBECK, *supra* note 33, at 120–21.

70. See 29 U.S.C. § 1104.

71. See, e.g., *Howard v. Shay*, 100 F.3d 1484, 1489–90 (9th Cir. 1996) (holding that obtaining an independent appraisal does not satisfy a fiduciary’s duty); *Fink v. Nat’l Sav. & Trust Co.*, 772 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 a fiduciary may seek advice from experts to fulfill section 404(a)’s prudence standards); see also ERISA FIDUCIARY LAW, *supra* note 60, at 237–38.

72. ERISA FIDUCIARY LAW, *supra* note 60, at 772–73.

73. 516 U.S. 489 (1996).

74. *Id.* at 506.

75. See *Fischer v. Phila. Electric Co.*, 96 F.3d 1533, 1539 (3d Cir. 1996); see also *Vartanian v. Monsanto Co.*, 131 F.3d 264, 268 (1st Cir. 1997); *Hockett v. Sun Co.*, 109 F.3d

to participants and beneficiaries summary plan descriptions, annual reports, and similar documents,<sup>76</sup> and ERISA fiduciaries may have a duty to correct any misstatement in these reports.<sup>77</sup>

Employee benefit plans may not exempt a fiduciary from the statutorily required responsibilities.<sup>78</sup> Fiduciaries who fail to fulfill their fiduciary responsibilities may be held personally liable under section 409 of ERISA for losses that result from the violation.<sup>79</sup>

Where there are multiple plan fiduciaries, a fiduciary may be held liable under section 405 of ERISA for another fiduciary's breach of duty.<sup>80</sup> The fiduciary may also be held liable 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."<sup>81</sup> Fiduciaries who have actual knowledge that they are assisting co-fiduciaries in violating ERISA have a duty to stop providing assistance and disclose the violations.<sup>82</sup>

Fiduciaries may also be held liable if they have "knowledge of" a co-fiduciary's breach and fail to take reasonable steps to remedy the breach.<sup>83</sup> The level of knowledge necessary to trigger the obligation varies, as some courts have held that actual knowledge is necessary to trigger the obligation,<sup>84</sup> while at least one court has held that constructive knowledge is sufficient.<sup>85</sup>

Finally, fiduciaries can be held liable if their failure to fulfill their fiduciary duties under section 404(a) enables co-fiduciaries to breach their own fiduciary duties.<sup>86</sup> In such a case, the fiduciary need have no actual

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1515, 1523 (10th Cir. 1997); *cf.* *Bins v. Exxon Co. U.S.A.*, 189 F.3d 929, 937 (9th Cir. 1999) (holding that "serious consideration" is one of the factors to be considered when determining if disclosure is required); *Ballone v. Eastman Kodak Co.*, 109 F.3d 117, 122 (2d Cir. 1997) ("serious consideration" is not the "talismanic" requirement in determining if disclosure is required).

76. *See* 29 U.S.C. § 1021 (2006); *see also* Clovis Trevino Bravo, *ERISA Misrepresentation and Nondisclosure Claims: Securities Litigation Under the Guise of ERISA?*, 26 HOFSTRA LAB. & EMP. L.J. 497, 513–14 (2009).

77. *See, e.g.,* *McAuley v. IBM Corp.*, 165 F.3d 1038, 1046 (6th Cir. 1999); *see also* ERISA FIDUCIARY LAW, *supra* note 60, at 789–90.

78. 29 U.S.C. § 1110(a); *see* WIEDENBECK, *supra* note 33, at 121.

79. 29 U.S.C. § 1109(a); *see* ERISA FIDUCIARY LAW, *supra* note 60, at 31.

80. 29 U.S.C. § 1105(a).

81. *Id.* § 1105(a)(1).

82. *See id.*; *see also* ERISA FIDUCIARY LAW, *supra* note 60, at 377.

83. 29 U.S.C. § 1105(a)(3).

84. *See, e.g.,* *Silverman v. Mut. Benefit Life Ins. Co.*, 138 F.3d 98, 103–04 (2d Cir. 1998) (holding that a fiduciary can be held liable only if he had actual knowledge of a co-fiduciary's breach); *Lee v. Burkhart*, 991 F.2d 1004, 1011 (2d Cir. 1993) (holding that a fiduciary must have actual knowledge of a co-fiduciary's breach); *Donovan v. Cunningham*, 716 F.2d 1455, 1475 (5th Cir. 1983) (holding that section 405 "does not impose vicarious liability" and instead requires actual knowledge by the fiduciary).

85. *See, e.g.,* *In re Dynegy, Inc. ERISA Litig.*, 309 F. Supp. 2d 861, 905–06 (S.D. Tex. 2004); *see also* ERISA FIDUCIARY LAW, *supra* note 60, at 378.

86. *See* 29 U.S.C. § 1105(a)(2) (providing that a fiduciary is liable for another fiduciary's breach if the fiduciary's failure to comply with section 404(a) has "enabled such other fiduciary to commit a breach"); *see also supra* notes 63–69 and accompanying text (discussing the ERISA fiduciary responsibility standards).

knowledge of the co-fiduciary's breach; it is sufficient that the co-fiduciary was able to commit the ERISA violation because the fiduciary failed to follow section 404(a).<sup>87</sup>

#### 4. Civil Enforcement of ERISA

Section 502(a) of ERISA<sup>88</sup> provides the primary means of civil enforcement of ERISA. This section discusses the three main options that section 502(a) provides.<sup>89</sup>

The first option authorizes a participant or beneficiary to bring an action under section 502(a)(1)(B) for "benefits due" under the plan, to enforce rights under the plan, or to clarify an individual's rights to future benefits under the plan.<sup>90</sup> This option is the "workhorse of ERISA remedy law" that participants routinely use when they believe they have been wrongfully denied plan benefits.<sup>91</sup>

The second option authorizes the Secretary of Labor, a participant, a beneficiary, or a fiduciary to bring an action under section 502(a)(2) against a fiduciary for breach of fiduciary duty as set forth in section 409 of ERISA.<sup>92</sup> In the case of a defined benefit plan, recovery under section 502(a)(2) is limited to relief sought on behalf of the plan, as opposed to relief on behalf of the individual.<sup>93</sup> In the case of a defined contribution plan, such as a 401(k) plan, individual recovery is permitted where a fiduciary's breach impairs the assets in the individual's account.<sup>94</sup>

The third option for bringing a civil action is found in section 502(a)(3), which permits a participant, beneficiary, or fiduciary to bring an action to "enjoin any act or practice which violates any provision of this subchapter or the terms of the plan" or to "obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."<sup>95</sup> This option has been viewed as a "catchall"

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87. See *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 284 F. Supp. 2d 511, 581 (S.D. Tex. 2003); see also ERISA FIDUCIARY LAW, *supra* note 60, at 378.

88. 29 U.S.C. § 1132(a) (2006 & Supp. III 2009).

89. Section 502(a) contains ten subsections detailing who can bring a civil action and under what circumstances a civil action may be brought. See *id.* This Note will focus only on the three primary means available to participants, beneficiaries, and fiduciaries. See *id.* § 1132(a)(1)–(3).

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

91. See 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. Readling, 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).

92. See 29 U.S.C. § 1132(a)(2); see also *supra* note 79 and accompanying text (describing fiduciary liability under section 409 of ERISA).

93. 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-Whole" Relief Is Available Under ERISA Section 502(a)(3)*, 61 OKLA. L. REV. 721, 738 (2008).

94. See *LaRue v. DeWolff, Boberg, & Assocs., Inc.*, 552 U.S. 248, 256 (2008); see also ZANGLEIN & STABILE, *supra* note 90, at 108–09.

95. 29 U.S.C. § 1132(a)(3).

provision, providing protection in instances not covered by sections 502(a)(1) or (2).<sup>96</sup> The Supreme Court, in a series of cases, determined that “appropriate equitable relief” available under section 502(a)(3) is limited to the type of relief “typically available” in courts of equity.<sup>97</sup>

Courts generally treat the list of plaintiffs provided in section 502(a) as exhaustive.<sup>98</sup> Thus, an individual or entity not specifically included within section 502(a) may not bring a civil action for violations of ERISA.<sup>99</sup>

### 5. ERISA Preemption

Section 514 of ERISA<sup>100</sup> provides that ERISA preempts state laws, and provides that ERISA “shall supersede any and all state laws insofar as they may now or hereafter relate to any” benefit plan covered by ERISA.<sup>101</sup> Congress included preemption to make regulation of benefit funds “exclusively a federal concern,”<sup>102</sup> and to ensure that ERISA plans do not have to deal with “conflicting or inconsistent” state laws.<sup>103</sup> Congressman John Dent, one of ERISA’s architects, called section 514 ERISA’s “crowning achievement.”<sup>104</sup> Courts have struggled to determine when ERISA preempts a state law, however.<sup>105</sup>

In early section 514 preemption cases, the Supreme Court broadly interpreted the doctrine of ERISA preemption.<sup>106</sup> The Court held that a state law “relates to” an ERISA plan if it makes “reference to” or has a “connection with” an ERISA plan.<sup>107</sup> Thus, the Court found that ERISA preempts state laws that specifically referenced plans governed by

96. See *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996); ZANGLEIN & STABILE, *supra* note 90, at 110; Langbein, *supra* note 91, at 1335.

97. See *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356, 361–62 (2006); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993); see also Langbein, *supra* note 91, at 1350.

98. See, e.g., *Leuthner v. Blue Cross & Blue Shield of Ne. Pa.*, 454 F.3d 120, 125 (3d Cir. 2006); *Felix v. Lucent Techs., Inc.*, 387 F.3d 1146, 1160 n.14 (10th Cir. 2004); see also WIEDENBECK, *supra* note 33, at 157; ZANGLEIN & STABILE, *supra* note 90, at 218–19.

99. WIEDENBECK, *supra* note 33, at 157; ZANGLEIN & STABILE, *supra* note 90, at 218–19.

100. 29 U.S.C. § 1144.

101. *Id.* § 1144(a). “‘State law’ includes all laws, decisions, rules, regulations, or other State action having the effect of law . . . .” *Id.* § 1144(c)(1). Preemption does not apply to any state law that regulates “insurance, banking, or securities.” *Id.* § 1144(b)(2)(A).

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

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

104. *Id.* at 29,197 (statement of Rep. John H. Dent).

105. At least one judge has likened the task of understanding ERISA preemption to a “descent into a Serbonian bog.” *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 454 (3d Cir. 2003) (Becker, J., concurring).

106. See ZANGLEIN & STABILE, *supra* note 90, at 122; Paul M. Secunda, *Sorry, No Remedy: Intersectionality and the Grand Irony of ERISA*, 61 HASTINGS L.J. 131, 137 (2009); Elizabeth Barnidge, Comment, *What Lies Ahead for ERISA’s Preemption Doctrine After a Judicial Call to Action Is Issued in Aetna Health Inc. v. Davila*, 43 HOUS. L. REV. 125, 135 (2006).

107. *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983).

ERISA,<sup>108</sup> and preempts state law even if the law is consistent with ERISA's purpose.<sup>109</sup> Additionally, the Court held that ERISA preempted a state law claim where the plaintiff's claim relies on the existence of, and participation in, an ERISA plan.<sup>110</sup>

In recent years, the Supreme Court has narrowed the scope of section 514 ERISA preemption.<sup>111</sup> The change began in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*,<sup>112</sup> where the Court shifted from the earlier broad view to one 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.'"<sup>113</sup> In *Travelers*, the Court discussed the policy reasons behind preemption—to allow for national uniformity of administration of employee benefit plans—and determined that the state law at issue was not preempted because it did not interfere with this purpose.<sup>114</sup> In cases after *Travelers*, the Court continued to determine whether ERISA preempts a state law by considering whether the state law undermines ERISA's policy objectives.<sup>115</sup>

Because preemption is a defense, and federal court subject matter jurisdiction is based on the well-pleaded complaint rule, ERISA section 514's preemption of a state law does not automatically confer federal court subject matter jurisdiction over the causes of action.<sup>116</sup> Nevertheless, the Supreme Court has determined that Congress's goal of "creating a comprehensive statute for the regulation of employee benefit plans" would be "completely undermined" if participants and beneficiaries could obtain

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108. See *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 829 (1988) (holding that a Georgia state law that specifically made reference to an ERISA plan was preempted by ERISA).

109. See *Metro. Life Ins. Co.*, 471 U.S. at 739.

110. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139–40 (1990) (holding that ERISA preempted a state law wrongful discharge claim where the reason for the discharge was to avoid making contributions to the pension fund).

111. ZANGLEIN & STABILE, *supra* note 90, at 122; Secunda, *supra* note 106, at 139–41; Barnidge, *supra* note 106, at 135.

112. 514 U.S. 645 (1995).

113. *Id.* at 655 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); see also ZANGLEIN & STABILE, *supra* note 90, at 132.

114. *Travelers*, 514 U.S. at 657–58.

115. See, e.g., *Boggs v. Boggs*, 520 U.S. 833, 843–44 (1997) (holding that a state law was preempted because it undermined ERISA by changing ERISA's "structure and balance"); *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 816 (1997) (holding that ERISA did not preempt a state tax on hospitals even though hospitals owned or operated by ERISA plans would need to pay the tax); *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 324–25 (1997) (holding that ERISA did not preempt a state law regulating apprenticeship programs because the state law did not apply specifically to ERISA plans); see also ZANGLEIN & STABILE, *supra* note 90, at 132–36; Secunda, *supra* note 106, at 139–41.

116. See *Aetna Health Inc. v. Davila*, 542 U.S. 200, 207–08 (2004); *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63–65 (1987); see also Robert A. Cohen, Note, *Understanding Preemption Removal Under ERISA § 502*, 72 N.Y.U. L. REV. 578, 596–97 (1997).

remedies under state law that ERISA section 502(a) does not provide.<sup>117</sup> Thus, any state law cause of action that “duplicates, supplements, or supplants” the remedies that section 502(a) provides is considered a federal claim and is completely preempted by ERISA.<sup>118</sup>

### B. An Overview of Whistleblower Laws

This section provides a general overview of whistleblower protection laws. This section first describes the creation of the modern form of whistleblower protection. Next, it explains the relationship between federal and state whistleblower protection, as well as differences between various state whistleblower protection laws. Finally, it compares the different methods whistleblowers can use to seek redress for violations.

#### 1. The Creation of Whistleblower Laws

Up until the 1960s, employees were not provided any protection from termination for exposing their employers’ improper practices.<sup>119</sup> This was justified by a strong belief in the doctrine of at-will employment.<sup>120</sup> Horace Gray Wood is credited with creating this doctrine in 1877.<sup>121</sup> Under the at-will employment doctrine, all hiring is presumed to be “at-will” and can be terminated at any time by either party.<sup>122</sup> This doctrine was based on the premise that employers needed flexibility in hiring, and that employees should be free to choose employment as they wished.<sup>123</sup> Various courts throughout the country adopted the rule after Wood espoused it in 1877.<sup>124</sup>

The at-will employment doctrine came under attack in the middle part of the twentieth century over concerns that employers were taking advantage of employees.<sup>125</sup> At the same time, the importance of whistleblowers

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117. See *Aetna Health Inc.*, 542 U.S. at 208–09; *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987); *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985); see also *supra* Part I.A.4 (describing remedies available under section 502(a)).

118. See *Aetna Health Inc.*, 542 U.S. at 209; *Taylor*, 481 U.S. at 66.

119. See Lois A. Lofgren, Comment, *Whistleblower Protection: Should Legislatures and the Courts Provide a Shelter to Public and Private Sector Employees Who Disclose the Wrongdoing of Employers?*, 38 S.D.L. REV. 316, 318 (1993).

120. See STEPHEN M. KOHN, CONCEPTS AND PROCEDURES IN WHISTLEBLOWER LAW 22 (2001); DANIEL P. WESTMAN & NANCY M. MODESITT, WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE 4–5 (2d ed. 2004).

121. See KOHN, *supra* note 120, at 21; Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 126 (1976).

122. See H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 272–73 (Albany, John D. Parsons, Jr. 1877).

123. WESTMAN & MODESITT, *supra* note 120, at 5; Richard A. Lord, *The At-Will Relationship in the 21st Century: A Consideration of Consideration*, 58 BAYLOR L. REV. 707, 719 (2006).

124. Feinman, *supra* note 121, at 126; Bruce D. Berns, Note, *Employers Beware: The Implied Contract Exception to the Employment-At-Will Doctrine*, 28 B.C. L. REV. 327, 331 n.44 (1987).

125. See KOHN, *supra* note 120, at 22. See generally Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967).

became increasingly recognized.<sup>126</sup> In 1959, California became the first state to create an exception to the at-will employment doctrine for whistleblowers.<sup>127</sup> The California District Court of Appeal held that public policy dictated that an employer should not be permitted to discharge an employee for truthfully disclosing information to a legislative body, rather than lying to the body.<sup>128</sup> Today, most states recognize some form of public policy exception to the at-will employment doctrine when an employer terminates an employee for an activity, such as whistleblowing, that “public policy would encourage,”<sup>129</sup> and many states have also enacted statutes to protect whistleblowers.<sup>130</sup>

## 2. Different Types of Whistleblower Laws

Most statutes that protect whistleblowers do not specifically refer to or define the term “whistleblower.”<sup>131</sup> Instead, the statutes describe specific conduct for which retaliation is prohibited.<sup>132</sup> To determine whether specific whistleblowing activity is protected, it is first necessary to determine whether the employee is a public sector or private sector employee.<sup>133</sup>

The Whistleblower Protection Act of 1989 (WPA)<sup>134</sup> protects federal public sector employees who engage in whistleblowing activities.<sup>135</sup> Congress passed the WPA in response to federal employees’ concerns that whistleblower complaints were not being investigated promptly, and that employees’ identities were being disclosed during the process.<sup>136</sup> The WPA sets deadlines for investigating whistleblower complaints and prohibits disclosure of employees’ identities.<sup>137</sup>

Nearly all states provide some form of statutory protection for whistleblowers.<sup>138</sup> The statutes differ on the extent of protection provided. Some states protect all public sector employees,<sup>139</sup> while other states protect only employees who perform specific types of work or who work at

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126. See KOHN, *supra* note 120, at 22.

127. See *Petermann v. Int’l Bhd. of Teamsters*, 344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959); KOHN, *supra* note 120, at 22–23.

128. See *Petermann*, 344 P.2d at 27.

129. KOHN, *supra* note 120, at 23.

130. *Id.* at 23–24; WESTMAN & MODESITT, *supra* note 120, at 10–11.

131. See WESTMAN & MODESITT, *supra* note 120, at 22.

132. See *id.*

133. See KOHN, *supra* note 120, at 1–2.

134. Pub. L. No. 101-12, 103 Stat. 16 (codified in scattered sections of 5 U.S.C.).

135. See KOHN, *supra* note 120, at 99–104; see also WESTMAN & MODESITT, *supra* note 120, at 62.

136. See WESTMAN & MODESITT, *supra* note 120, at 62.

137. See 5 U.S.C. § 1213 (2006); see also KOHN, *supra* note 120, at 100–02; WESTMAN & MODESITT, *supra* note 120, at 62–63.

138. See KOHN, *supra* note 120, at 23; WESTMAN & MODESITT, *supra* note 120, at 67, 78; see also *State Whistleblower Laws*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/?tabid=13390> (last visited Sept. 21, 2011).

139. See, e.g., ALASKA STAT. § 39.90.100 (2010); DEL. CODE ANN. tit. 19, §§ 1702–1703 (2005); see also WESTMAN & MODESITT, *supra* note 120, at 67.

specific levels of government.<sup>140</sup> Some states also provide statutory protection to private sector employees.<sup>141</sup> Just as with public sector statutes, these private sector protection statutes vary in the scope of protection, with some providing protection to all private sector employees,<sup>142</sup> and others only providing protection to employees who engage in specific types of whistleblowing activities.<sup>143</sup> State courts have also created common law exceptions to the at-will employment doctrine that protect specific types of whistleblowing activities.<sup>144</sup>

Unlike the WPA, which covers all federal sector employees, there is no single federal statute that protects all private sector whistleblowers.<sup>145</sup> Instead, Congress included language in various statutes to protect specific private sector whistleblower activity.<sup>146</sup> Each statute provides varying levels of protection and each works in a different way.<sup>147</sup> For example, employees are protected from employer retaliation if they report to the Occupational Health and Safety Administration regarding workplace safety issues that present imminent danger or physical harm.<sup>148</sup> Title VII of the Civil Rights Act of 1964 prohibits an employer from terminating an employee who opposes an employer's discriminatory practices.<sup>149</sup> When Congress passed the Sarbanes-Oxley Act of 2002, it not only prohibited retaliation against Sarbanes-Oxley whistleblowers, but also made employer retaliation a criminal offense punishable by up to ten years in prison.<sup>150</sup> In the recently passed Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress provided incentives for individuals who come forward with "original" information to the Securities and Exchange

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140. See, e.g., NEB. REV. STAT. § 81-2703 (2008) (not protecting certain individuals and entities); WYO. STAT. ANN. § 9-11-102 (2011) (protecting state employees who work more than twenty hours per week); see also WESTMAN & MODESITT, *supra* note 120, at 67.

141. See WESTMAN & MODESITT, *supra* note 120, at 77-79.

142. See, e.g., CONN. GEN. STAT. ANN. § 31-51m (West 2011) (protecting any employee who reports a violation of law to a public body); ME. REV. STAT. ANN. tit. 26, §§ 832-833 (2007); see also WESTMAN & MODESITT, *supra* note 120, at 77-79.

143. See, e.g., ALASKA STAT. § 18.60.089 (protecting individuals who report a violation of a safety or health standard); S.C. CODE ANN. § 41-15-510 (1986) (protecting employees who report health and safety violations); see also WESTMAN & MODESITT, *supra* note 120, at 77-79.

144. See, e.g., *Brigham v. Dillon Cos.*, 935 P.2d 1054, 1060 (Kan. 1997) (recognizing a public policy exception for wrongful demotion); *Trosper v. Bag 'N Save*, 734 N.W.2d 704, 707 (Neb. 2007) (recognizing a public policy exception when an employee is terminated for filing a workers' compensation claim); *Petermann v. Int'l Bhd. of Teamsters*, 344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959); see also WESTMAN & MODESITT, *supra* note 120, at 95-96.

145. See KOHN, *supra* note 120, at 79-80; WESTMAN & MODESITT, *supra* note 120, at 77-78.

146. See KOHN, *supra* note 120, at 80; WESTMAN & MODESITT, *supra* note 120, at 78.

147. KOHN, *supra* note 120, at 80; WESTMAN & MODESITT, *supra* note 120, at 88-92.

148. See 29 U.S.C. §§ 657(f), 660(c) (2006); KOHN, *supra* note 120, at 94-95; WESTMAN & MODESITT, *supra* note 120, at 90.

149. See 42 U.S.C. § 2000e-3(a) (2006); KOHN, *supra* note 120, at 83-86.

150. See Pub. L. No. 107-204, § 1107, 116 Stat. 745, 810 (codified as amended at 18 U.S.C. § 1513(e) (Supp. III 2009)) (allowing for a maximum of ten years in prison for retaliating against a whistleblower); see also STEPHEN M. KOHN ET AL., *WHISTLEBLOWER LAW: A GUIDE TO LEGAL PROTECTIONS FOR CORPORATE EMPLOYEES* 157-58 (2004).

Commission.<sup>151</sup> These individuals are rewarded with a percentage of the monetary sanctions resulting from the information they provided.<sup>152</sup>

### 3. Reporting a Violation: Internal vs. External Whistleblower Complaints

This section explains the different types of reporting mechanisms in whistleblower protection acts, and discusses the different views that exist over whether particular whistleblower activities deserve protection. This section specifically focuses on two types of whistleblower activities. The first is “internal” whistleblowing, where all the employee’s actions take place within the organization,<sup>153</sup> and the second is “external” whistleblowing, where the employee makes a complaint outside of the organization.<sup>154</sup>

Internal whistleblowing is sometimes the best way for an employee to report problems within an organization.<sup>155</sup> While an external disclosure can harm the company’s reputation, cause the company to incur legal costs, and cause a drop in the company’s stock price,<sup>156</sup> an internal complaint typically gives the employer the opportunity to rectify any problems without negative publicity and without absorbing heavy costs associated with a public disclosure.<sup>157</sup> Employers can also deal with internal complaints more quickly than complaints outside the organization.<sup>158</sup> An internal complaint may result in less hardship for both the employee and the employer.<sup>159</sup> Furthermore, most employees prefer to report the situation internally.<sup>160</sup>

If an employee’s internal report fails to convince the employer to fix any problems, the employee may report the problem to an outside body or

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151. See Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841 (2010) (to be codified at 15 U.S.C. § 78u-6).

152. See *id.*

153. WESTMAN & MODESITT, *supra* note 120, at 23. This Note will discuss the conflict over whether section 510 of ERISA protects internal whistleblower complaints in greater detail in Part II.

154. *Id.*

155. Terry Morehead Dworkin & Melissa S. Baucus, *Internal vs. External Whistleblowers: A Comparison of Whistleblowing Processes*, 17 J. BUS. ETHICS 1281, 1297 (1998); Kevin Rubinstein, Note, *Internal Whistleblowing and Sarbanes-Oxley Section 806: Balancing the Interests of Employee and Employer*, 52 N.Y.L. SCH. L. REV. 637, 641–42 (2007/08).

156. See Robert M. Bowen et al., *Whistle-Blowing: Target Firm Characteristics and Economic Consequences*, 85 ACCT. REV. 1239, 1253–55 (2010).

157. Marcia P. Miceli et al., *A Word to the Wise: How Managers and Policy Makers Can Encourage Employees to Report Wrongdoing*, 86 J. BUS. ETHICS 379, 380 (2009); Rubinstein, *supra* note 155, at 641–42.

158. See Lilanthi Ravishankar, *Encouraging Internal Whistleblowing in Organizations*, SANTA CLARA U. (2003), <http://www.scu.edu/ethics/publications/submitted/whistleblowing.html>.

159. See Terry Morehead Dworkin & Elletta Sangrey Callahan, *Internal Whistleblowing: Protecting the Interests of the Employee, the Organization, and Society*, 29 AM. BUS. L.J. 267, 300 (1991); Ravishankar, *supra* note 158.

160. See MICELI & NEAR, *supra* note 17, at 61; Dworkin & Callahan, *supra* note 159, at 299–301.

regulatory agency.<sup>161</sup> Employees who make complaints run the risk that the employer may terminate them for making the complaint.<sup>162</sup> Because whistleblower protection does not always extend to internal whistleblowing, an employee so terminated may have no remedy.<sup>163</sup>

Commentators offer several rationales as to why no protection should be offered to internal whistleblowers. One view is that because internal whistleblowing is “non-adversarial,” it does not pose a threat to the employer.<sup>164</sup> Thus, an employer is unlikely to retaliate against the employee.<sup>165</sup> It is therefore unnecessary to provide protection to such employees.<sup>166</sup> Yet another concern is that an employee might fabricate an internal complaint to justify a retaliation claim.<sup>167</sup> This risk is lessened if the employee is required to report formally to an administrative body.<sup>168</sup> A further concern is the difficulty of proving that an employee was discharged in retaliation for the complaint.<sup>169</sup> For example, an employer may claim that it did not terminate the employee because of the internal disclosure, but because of an internal management dispute.<sup>170</sup>

An additional rationale for not protecting internal whistleblowers lies in the history of whistleblower law itself.<sup>171</sup> Courts originally created a public policy exception to the doctrine of at-will employment to provide whistleblower protection to employees.<sup>172</sup> Unlike external disclosures, internal disclosures do not bring public attention to any violations.<sup>173</sup> Some commentators assert that internal complaints are not deserving of protection because without public knowledge, the public does not benefit.<sup>174</sup> This logic also helps to explain why some states’ whistleblower protection

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161. See MICELI & NEAR, *supra* note 17, at 61; WESTMAN & MODESITT, *supra* note 120, at 48–49.

162. See WESTMAN & MODESITT, *supra* note 120, at 24.

163. See Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 CALIF. L. REV. 443, 446 (2009); see also *infra* Part II.

164. See Richard R. Carlson, *Citizen Employees*, 70 LA. L. REV. 237, 297 (2009).

165. See *id.* at 298.

166. See *id.*

167. See *id.*

168. Cf. *id.* (“Limiting protection to external whistleblowers means that there will ordinarily be an objective record of a report to an independent authority.”).

169. See Sarah M. Baum, Note, Callahan v. Edgewater Care & Rehabilitation Center: *The Illinois Whistleblower Act Does Not Preempt the Common Law Tort of Retaliatory Discharge*, 57 DEPAUL L. REV. 161, 188 (2007).

170. See *id.*

171. See *supra* Part I.B.1 (explaining creation of whistleblower laws).

172. See Alex B. Long, *Viva State Employment Law! State Law Retaliation Claims in a Post-Crawford/Burlington Northern World*, 77 TENN. L. REV. 253, 292–93 (2010); Joseph C. Telezinski, Jr., Comment, *Without Warning—The Dangers of Protecting “Whistleblowers” Who Don’t Blow the Whistle*, 27 W. ST. U. L. REV. 397, 417–18 (2000); see also *supra* Part I.B.1.

173. See Long, *supra* note 172, at 293; Telezinski, *supra* note 172, at 418.

174. See Long, *supra* note 172, at 293; Telezinski, *supra* note 172, at 418.

statutes protect only employees who report violations that impact public health or public safety.<sup>175</sup>

The public has held whistleblowers out as heroes for their work on numerous occasions.<sup>176</sup> Whistleblowers often place their livelihoods at great risk when they report, however.<sup>177</sup> A whistleblower who does not come forward in the manner prescribed by the statute risks forfeiting the statutory whistleblower protection.<sup>178</sup> Thus, whistleblowers should know exactly what type of whistleblowing activity is protected before they make a disclosure.<sup>179</sup>

In states that provide protection to private sector whistleblowers, there is no uniform rule regarding the type of complaint that triggers legal protection.<sup>180</sup> Some states only protect external disclosures,<sup>181</sup> some protect internal and external disclosures,<sup>182</sup> and some protect external disclosures only if the employee first attempts an internal disclosure.<sup>183</sup>

### C. An Overview of Section 510 of ERISA

This section reviews the background of section 510 of ERISA and the protections that the statute provides to plan participants, beneficiaries, and fiduciaries.

Congress included section 510 in the original act passed in 1974<sup>184</sup> in response to concerns that employers might try to prevent an employee from

175. See Stewart J. Schwab, *Wrongful Discharge Law and the Search for Third-Party Effects*, 74 TEX. L. REV. 1943, 1970 (1996); see also *supra* notes 138–43 and accompanying text.

176. See, e.g., Robert Trigaux, *Top 10 Reasons Why Whistle-Blowers Are Heroes*, ST. PETERSBURG TIMES, Feb. 15, 2002, [http://www.sptimes.com/2002/02/15/Columns/Top\\_10\\_reasons\\_why\\_wh.shtml](http://www.sptimes.com/2002/02/15/Columns/Top_10_reasons_why_wh.shtml); *Time Names Whistleblowers as Persons of Year*, CNN.COM (Dec. 23, 2002), [http://articles.cnn.com/2002-12-23/us/time.persons.of.year\\_1\\_icy-river-whistleblowers-accounting-irregularities?\\_s=PM:US](http://articles.cnn.com/2002-12-23/us/time.persons.of.year_1_icy-river-whistleblowers-accounting-irregularities?_s=PM:US) (noting that six out of ten Americans view whistleblowers as heroes).

177. Lobel, *supra* note 163, at 486–87; see KOHN, *supra* note 120, at 21–23.

178. WESTMAN & MODESITT, *supra* note 120, at 48–51.

179. See KOHN, *supra* note 120, at 1–3; WESTMAN & MODESITT, *supra* note 120, at 41–42.

180. WESTMAN & MODESITT, *supra* note 120, at 82–84.

181. See, e.g., 740 ILL. COMP. STAT. ANN. 174/15 (West 2010) (only protecting individuals who provide information externally); MICH. COMP. LAWS ANN. § 15.362 (West 2004) (only protecting employees who make an external report); see also WESTMAN & MODESITT, *supra* note 120, at 83.

182. See, e.g., DEL. CODE ANN. tit. 19, § 1703 (2005) (protecting internal and external disclosures); HAW. REV. STAT. § 378-62 (West 2008) (protecting a whistleblower who reports to an employer or to a public body); see also WESTMAN & MODESITT, *supra* note 120, at 83.

183. See, e.g., FLA. STAT. ANN. § 448.102 (West 2002) (protecting an employee who discloses or “threaten[s] to disclose” information to an outside body so long as the employee first gives the supervisor an opportunity to correct the activity); N.Y. LAB. LAW § 740 (McKinney 2002 & Supp. 2011) (requiring that the employee first notify a supervisor of a violation before making an external disclosure); OHIO REV. CODE ANN. § 4113.52 (LexisNexis 2007) (requiring that an employee report to a supervisor before making an external disclosure); see also WESTMAN & MODESITT, *supra* note 120, at 83.

184. See Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 510, 88 Stat. 829, 895 (codified as amended at 29 U.S.C. § 1140 (2006)).

attaining benefits.<sup>185</sup> Senator Jacob K. Javits, one of the main sponsors of ERISA, described section 510 as providing “a remedy for any person fired such as is provided for a person discriminated against because of race or sex.”<sup>186</sup> The House and Senate Reports on ERISA both state that Congress intended that section 510 provide “broad remedies for redressing or preventing violations” of ERISA.<sup>187</sup>

Section 510 of ERISA can be broken down into three main parts.<sup>188</sup> The first part makes it unlawful for any person to “discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary” for exercising any right to which the participant or beneficiary is entitled under ERISA (the Exercise Clause).<sup>189</sup> The Exercise Clause is designed to prevent an employer from terminating an employee because the employee filed a claim for benefits, or brought litigation challenging a denial of benefits.<sup>190</sup>

The second part of section 510 makes it unlawful for a person to “interfer[e] with the attainment” of any right to which the participant “may become entitled” (the Interference Clause).<sup>191</sup> Because Congress was concerned that employers would fire employees just before they would vest in a pension plan,<sup>192</sup> section 510 prohibits such activity.<sup>193</sup> Congress included the Interference Clause to prevent an “unscrupulous employer[]” from discharging an employee to prevent the employee from obtaining vested benefits.<sup>194</sup> Because welfare benefits, in contrast to pension benefits, do not vest,<sup>195</sup> there was initially a question of whether section 510 applied to welfare plans.<sup>196</sup> The Supreme Court settled this question

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185. See 119 CONG. REC. 30,043–44 (1973).

186. *Id.* at 30,044.

187. H.R. REP. NO. 93-533, at 17 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4655; S. REP. NO. 93-127, at 35 (1973), reprinted in 1974 U.S.C.C.A.N. 4838, 4871.

188. In 2006, Congress amended section 510 to protect a “contributing employer” who exercises rights under ERISA or who gives information or testifies in any “inquiry or proceeding” relating to ERISA. See Pension Protection Act of 2006, Pub. L. 109-280, § 205, 120 Stat. 780, 889 (codified at 29 U.S.C. § 1140). This Note will not discuss this additional protection.

189. 29 U.S.C. § 1140.

190. See *Kowalski v. L & F Prods.*, 82 F.3d 1283, 1285 (3d Cir. 1996); see also *ZANGLEIN & STABILE*, *supra* note 90, at 922.

191. 29 U.S.C. § 1140.

192. An employee who vests in a pension fund has a “non-forfeitable right to benefits funded by employer contributions.” *FAQs About ERISA*, *supra* note 43; see 29 U.S.C. § 1053 (2006 & Supp. III 2009).

193. See *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 143 (1990); *WIEDENBECK*, *supra* note 33, at 173.

194. See *West v. Butler*, 621 F.2d 240, 245 (6th Cir. 1980); see also S. REP. NO. 93-127, at 35 (1973), reprinted in 1974 U.S.C.C.A.N. 4838, 4871; *ZANGLEIN & STABILE*, *supra* note 90, at 922.

195. See 29 U.S.C. § 1051(1) (2006) (exempting welfare plans from ERISA’s vesting requirements).

196. Compare *Shahid v. Ford Motor Co.*, 76 F.3d 1404, 1411 (6th Cir. 1996) (finding that section 510 is not limited to “benefits that will become vested”), and *Heath v. Varsity Corp.*, 71 F.3d 256, 258 (7th Cir. 1995) (finding that section 510 applies to both rights that are and are not capable of vesting), with *Inter-Modal Rail Emps. Ass’n v. Atchison, Topeka & Santa*

by holding that section 510 protects welfare plan benefits.<sup>197</sup> Some courts have also held that section 510 protects participants where the employer's action prevents them from obtaining increased benefits.<sup>198</sup>

The third part of section 510—and the part most relevant to this Note—makes it “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 ERISA.<sup>199</sup> For a claim based on section 510, an employee must demonstrate that the employer discharged the employee with the specific intent to interfere with the employee's attainment of benefits.<sup>200</sup> Courts have determined that this provision bars an employer from terminating an individual who testified about an ERISA-related matter in court or before an administrative agency.<sup>201</sup> The question, however, is whether section 510 also applies when an employer terminates an individual for reporting ERISA violations internally.<sup>202</sup> This conflict will be discussed further in Part II of this Note.

Despite Congress's intention to establish “broad remedies” under section 510,<sup>203</sup> there are several noticeable limits to its application. Section 510 is enforced through the civil enforcement framework laid out in section 502.<sup>204</sup> Accordingly, the only individuals permitted to bring actions for violations of section 510 are those listed in section 502,<sup>205</sup> and the only remedies available are those provided in section 502.<sup>206</sup>

Section 510 may preempt state law wrongful discharge claims.<sup>207</sup> Several circuits have held that ERISA can preempt state law even if ERISA does not provide the remedy that the plaintiff seeks.<sup>208</sup> Thus, an employee

Fe Ry. Co., 80 F.3d 348, 351 (9th Cir. 1996) (holding that section 510 only applies to rights that are capable of vesting), *vacated*, 520 U.S. 510 (1997).

197. *See* Inter-Modal Rail Emps. Ass'n v. Atchison, Topeka & Santa Fe Ry. Co., 520 U.S. 510, 512 (1997).

198. *See, e.g.*, Godfrey v. BellSouth Telecomms., Inc., 89 F.3d 755, 759 (11th Cir. 1996); *Heath*, 71 F.3d at 258; *Conkwright v. Westinghouse Electric Corp.*, 933 F.2d 231, 237 (4th Cir. 1991).

199. 29 U.S.C. § 1140.

200. *See, e.g.*, *Bodine v. Emp'rs Cas. Co.*, 352 F.3d 245, 250 (5th Cir. 2003); *Salus v. GTE Directories Serv. Corp.*, 104 F.3d 131, 135 (7th Cir. 1997); *Barbour v. Dynamics Research Corp.*, 63 F.3d 32, 38 (1st Cir. 1995).

201. *See* *King v. Marriott Int'l, Inc.*, 337 F.3d 421, 427 (4th Cir. 2003); *cf.* *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 223 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 1604 (2011).

202. *See infra* Part II.

203. *See supra* notes 185–87 and accompanying text.

204. *See* 29 U.S.C. § 1140 (2006) (“The provisions of [29 U.S.C. § 1132] shall be applicable in the enforcement of this section.”); *see also supra* Part I.A.4 (describing ERISA's civil enforcement framework).

205. *See supra* notes 97–99 and accompanying text.

206. *See supra* notes 97–99 and accompanying text.

207. *See supra* Part I.A.5.

208. The Fifth, Sixth, and Ninth Circuits have held that ERISA preempts state law even if the particular remedy sought is unavailable under ERISA. *See, e.g.*, *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311, 1314 (5th Cir. 1994); *Hashimoto v. Bank of Haw.*, 999 F.2d 408, 412 (9th Cir. 1993); *Authier v. Ginsberg*, 757 F.2d 796, 802 (6th Cir. 1985).

making a whistleblower complaint under the assumption that state law protects the activity and provides an appropriate remedy may discover that state law does not apply and that federal law does not provide the remedy sought by the plaintiff.<sup>209</sup>

## II. PROTECTION OF INTERNAL COMPLAINTS: THE CIRCUIT SPLIT

Part II of this Note details the conflict between U.S. Courts of Appeals over whether section 510 protects individuals who make internal complaints about ERISA violations. While section 510 is clearly understood to protect an employee who testifies before a court or gives information to a regulatory body such as the Department of Labor,<sup>210</sup> it is less clear what protection section 510 affords an employee who notifies an employer of ERISA violations taking place within the company. First, this part details the view of the Ninth and Fifth Circuits that section 510 protects unsolicited internal complaints. Part II.B analyzes the Fourth Circuit's view that section 510 protects only formal external complaints. Part II.C discusses the Second Circuit's position that internal complaints are protected as long as they are part of an "inquiry or proceeding." Part II.D details the view of the Third Circuit that section 510 does not protect unsolicited internal complaints.

### A. *Unsolicited Internal Complaints Are Protected*

#### 1. The Ninth Circuit

In *Hashimoto v. Bank of Hawaii*,<sup>211</sup> the Ninth Circuit held that section 510 of ERISA protects employees who make unsolicited internal complaints to employers about ERISA violations.<sup>212</sup> Plaintiff Jessica Hashimoto brought a lawsuit in Hawaii state court alleging that her employer, the Bank of Hawaii, terminated her for complaining to her supervisors about various ERISA violations.<sup>213</sup> This, she asserted, violated Hawaii's Whistleblowers Protection Act.<sup>214</sup> Hashimoto alleged that Donald Feekin, an employee of the bank, improperly ordered her to reimburse a former employee from a profit-sharing plan for taxes that had been properly withheld from distribution.<sup>215</sup> She further alleged that Judith Wetzel, another bank employee, ordered her to improperly "recalculate a

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209. See David Angueira & David Conforto, *Without a Remedy: The Massachusetts Whistleblower's Brush with ERISA*, 39 SUFFOLK U. L. REV. 955, 956 (2006); Jessica Barclay-Strobel, Comment, *Shooting the Messenger: How Enforcement of FLSA and ERISA Is Thwarted by Courts' Interpretations of the Statutes' Antiretaliation and Remedies Provisions*, 58 UCLA L. REV. 521, 542 (2010).

210. See *supra* note 201 and accompanying text.

211. 999 F.2d 408 (9th Cir. 1993).

212. See *id.* at 411.

213. See *id.* at 409–10.

214. See *id.* at 409.

215. See *id.* at 410.

former employee's pension plan benefit and to use final pay, not final average pay."<sup>216</sup>

After the bank removed the case to federal court, the district court granted summary judgment to the bank on the grounds that ERISA preempted Hashimoto's state law claim.<sup>217</sup> On appeal, the Ninth Circuit determined that section 510 provided protection to whistleblowers, and that section 502(a) empowered Hashimoto to bring a cause of action for relief.<sup>218</sup> The court determined ERISA's preemption of state law was "total" because the state law cause of action could be characterized as a federal action.<sup>219</sup>

To reach its determination, the court analyzed the specific language of section 510.<sup>220</sup> Noting that section 510 protects an individual who gives "information or has testified or is about to testify in any inquiry or proceeding" relating to ERISA, the court held that the statute was "clearly meant to protect whistle blowers."<sup>221</sup> As a result, the statute protects employees like Hashimoto who are fired for protesting ERISA violations.<sup>222</sup>

To determine what type of "inquiry or proceeding" the statute protects the court analyzed the process that an employee would be likely to take when making a whistleblower complaint.<sup>223</sup> The court reasoned that an employee would normally notify an ERISA plan manager before going to an outside agency like the Department of Labor.<sup>224</sup> If employers face no consequence for discharging employees who initially complain to management, the whole process would be cut off at the start.<sup>225</sup> Thus, allowing "anticipatory discharge discourages the whistle blower before the whistle is blown."<sup>226</sup>

The court did not, however, reach the question of whether section 510 protects all employees and former employees who are terminated for notifying management about ERISA violations.<sup>227</sup> The court held only that Hashimoto was entitled to bring an action under section 510 because section 502(a) afforded her a cause of action as an ERISA fiduciary.<sup>228</sup>

In *McBride v. PLM International, Inc.*,<sup>229</sup> the Ninth Circuit considered whether an employee who was terminated after engaging in whistleblower

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216. *Id.*

217. *See id.*

218. *See id.* at 411–12.

219. *See id.* at 412; *see also supra* Part I.A.5.

220. *See Hashimoto*, 999 F.2d at 411.

221. *Id.*

222. *Id.*

223. *See id.*

224. *See id.*

225. *See id.*

226. *Id.*

227. *Id.*

228. The court noted that it was possible that only individuals whom section 502 "empower[s] to bring a civil action" may bring an action based on section 510. *See id.*; *see also supra* notes 97–99 and accompanying text.

229. 179 F.3d 737 (9th Cir. 1999).

activity was entitled to bring a cause of action as a participant under sections 510 and 502(a).<sup>230</sup> The court reaffirmed its holding in *Hashimoto* that section 510 is “clearly meant to protect whistle blowers” and then considered whether section 510 applied to a plan participant.<sup>231</sup> In *McBride*, the court rejected the defendant’s assertion that McBride was no longer a participant because the plan in issue had been terminated by the time the plaintiff filed the lawsuit.<sup>232</sup> The court held that the status of the individual making the complaint should be judged at the time the complaint arises, not at the time that litigation commences.<sup>233</sup> The court noted that the defendant’s interpretation would encourage employers to terminate plans to avoid liability for section 510 violations.<sup>234</sup> Thus, section 510 protects participants who engage in whistleblowing activity.<sup>235</sup>

## 2. The Fifth Circuit

The Fifth Circuit was the next circuit to consider section 510’s reach. In *Anderson v. Electronic Data Systems Corp.*,<sup>236</sup> the Fifth Circuit determined that section 510 protects unsolicited internal complaints.<sup>237</sup>

Plaintiff George Anderson initially brought state common law claims against Electronic Data Systems (EDS) in Texas state court asserting, among other claims, wrongful discharge.<sup>238</sup> Anderson alleged that another employee at EDS had asked him to approve payment invoices for funds retained by another employee without approval of the pension fund’s board of trustees, and to write up minutes for meetings that he did not attend, both violations of ERISA.<sup>239</sup> Anderson claimed that EDS terminated him after he refused to commit the acts and reported the other employee’s conduct to management.<sup>240</sup> EDS removed the case to federal district court, which granted summary judgment to EDS on the wrongful discharge claim.<sup>241</sup> Anderson appealed, claiming that the district court lacked subject matter jurisdiction and seeking a remand to state court on the wrongful discharge claim.<sup>242</sup>

The Fifth Circuit, noting that Anderson had never asserted a federal cause of action, analyzed whether ERISA preemption allowed for removal to

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230. *Id.* at 740–41.

231. *Id.* at 742.

232. *See id.* at 743–44.

233. *See id.* at 743.

234. *See id.* at 746.

235. *See id.* at 743.

236. 11 F.3d 1311 (5th Cir. 1994).

237. *See id.* at 1314.

238. *See id.* at 1312.

239. *See id.* at 1312–13.

240. *See id.*

241. *See id.* at 1313.

242. *See id.* Anderson sought to keep the case out of federal court by deleting all references to ERISA from his complaint. *See id.* The court held that deleting the references did not alter the fact that the action depended on the existence of an ERISA plan and was thus preempted by ERISA. *See id.* at 1314; *see also supra* Part I.A.5 (explaining ERISA preemption).

federal court.<sup>243</sup> The court first considered whether ERISA preempted Anderson's state law claims.<sup>244</sup> The court followed the Supreme Court's reasoning in *Ingersoll-Rand Co. v. McClendon*.<sup>245</sup> In *McClendon*, the Supreme Court had held that ERISA preempted a state law wrongful discharge claim because the claim did not just involve an ERISA plan, but depended on the "existence" of an ERISA plan,<sup>246</sup> and because the state claim would conflict with the enforcement provisions provided by ERISA sections 502 and 510.<sup>247</sup> The Fifth Circuit determined that Anderson's claim depended on the existence of an ERISA plan because it was based on his refusal to commit ERISA violations and his reporting the violations to management.<sup>248</sup> Additionally, Anderson's claim fell "squarely within the ambit" of section 510.<sup>249</sup> Thus, the court concluded that ERISA preempts a state wrongful discharge claim for "refusal to commit [ERISA violations] and for reporting such violations to management."<sup>250</sup>

The court next considered whether the federal court had subject matter jurisdiction over Anderson's state law wrongful discharge claim.<sup>251</sup> The court applied the Supreme Court's reasoning from *Metropolitan Life Insurance Co. v. Taylor*.<sup>252</sup> In *Taylor*, the Supreme Court had held that a cause of action that falls within the scope of section 502(a) is completely preempted by ERISA and subject to removal.<sup>253</sup> Section 502 enforces section 510, which "broadly prohibits" an employer from terminating participants and beneficiaries for giving information or testimony relating to ERISA.<sup>254</sup> Thus, the federal court had subject matter jurisdiction because Anderson's claim fell within the enforcement provisions provided by section 502(a).<sup>255</sup>

The court noted that the U.S. District Court for the District of Minnesota reached the same conclusion in *McLean v. Carlson Cos.*<sup>256</sup> In *McLean*, the district court determined that a plaintiff who was discharged for making an internal complaint had standing to bring an action under section 502(a).<sup>257</sup> The district court reasoned that it made no sense to permit a participant to

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243. *See Anderson*, 11 F.3d at 1313.

244. *See id.* at 1313–14.

245. 498 U.S. 133 (1990).

246. *See id.* at 140.

247. *See id.* at 144.

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

249. *See id.*

250. *See id.*

251. *Id.* at 1315. The court noted that preemption does not end the court's analysis because preemption is a defense and "federal question jurisdiction is determined by the well-pleaded complaint rule." *Id.*; *see supra* notes 116–18 and accompanying text (detailing how ERISA completely preempts state law claims where the claim could have been brought under section 502(a)).

252. 481 U.S. 58 (1987).

253. *Id.* at 66–67.

254. *See Anderson*, 11 F.3d at 1315; *see also* 29 U.S.C. § 1140 (2006); *supra* Part I.C.

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

256. 777 F. Supp. 1480 (D. Minn. 1991); *see Anderson*, 11 F.3d at 1315 n.5.

257. *See McLean*, 777 F. Supp. at 1484.

seek an injunction under that provision while at the same time denying a remedy to a participant who was terminated for complaining internally.<sup>258</sup>

*B. The Fourth Circuit: Section 510 Protects Only Formal Complaints*

In *King v. Marriott International, Inc.*,<sup>259</sup> the Fourth Circuit held that section 510 protects only “formal” disclosures.<sup>260</sup> Plaintiff Karen King brought a state law wrongful discharge claim asserting that she was terminated for complaining about, and refusing to commit, ERISA violations.<sup>261</sup> King alleged that in late 1998 or early 1999 Karl Fredericks, Marriott’s Senior Vice President of Compensation and Benefits, recommended that “Marriott transfer millions of dollars from its medical plan into its general corporate reserve account.”<sup>262</sup> King expressed concern about this transaction.<sup>263</sup> In late 1999, Fredericks promoted King and gave her certain responsibilities over benefit plan finances.<sup>264</sup> After her promotion, King learned that the transfer of assets to the reserve fund was under consideration once again.<sup>265</sup> Concerned that this transaction would violate ERISA, King notified Fredericks that she objected to the transaction and requested an opinion letter from an in-house attorney.<sup>266</sup> In September 1999, Fredericks restructured the benefits department and again promoted King, this time to Vice President of Benefits Resources.<sup>267</sup> In early 2000, Marriott proposed, and King objected to, another reserve fund transfer.<sup>268</sup> Fredericks fired King shortly thereafter.<sup>269</sup>

King filed an action in Maryland state court claiming her termination violated public policy and was thus actionable under Maryland’s public policy exception to the at-will employment doctrine.<sup>270</sup> Marriott removed the case to federal court on the ground that section 510 of ERISA preempted the state law wrongful discharge claim.<sup>271</sup> After it denied King’s motion to remand the case to state court, the district court granted Marriott summary judgment on all claims.<sup>272</sup>

The Fourth Circuit, in reviewing the lower court’s denial of King’s motion to remand, considered whether section 510 preempted her state law

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258. *See id.*

259. 337 F.3d 421 (4th Cir. 2003).

260. *See id.* at 427.

261. *See id.* at 423.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *See id.*

268. *Id.*

269. *Id.* When Fredericks reorganized the benefits fund department, he placed King and another employee in charge of the benefits fund department. *Id.* King and the other employee feuded over the division of responsibilities, and Fredericks claimed that they were both terminated over the feud. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 423–24.

whistleblower complaint.<sup>273</sup> The circuit court analyzed the language of section 510 to determine whether it applied to unsolicited internal complaints.<sup>274</sup> In doing so, the court focused on the meaning of the phrase “inquiry or proceeding,” and looked to its interpretation of a similar provision in the Fair Labor Standards Act of 1938 (FLSA).<sup>275</sup> The FLSA’s whistleblower protection statute prohibits an employer from terminating an employee who has “filed any complaint or instituted or caused to be instituted any proceeding under or related to [the FLSA], or has testified or is about to testify in any such proceeding.”<sup>276</sup> In *Ball v. Memphis Bar-B-Q Co.*,<sup>277</sup> the Fourth Circuit held that “proceedings” under the FLSA are “procedures conducted in judicial or administrative tribunals.”<sup>278</sup> The court also held that “the term ‘instituted’ connotes” a level of formality that is not reached by making an “oral complaint to [a] supervisor.”<sup>279</sup> Thus, the court in *Ball* determined that Congress intended in the FLSA to protect only those employees who testify after “formal” proceedings begin, and did not intend the FLSA to protect employees who complain internally to their supervisors.<sup>280</sup>

In *King*, the Fourth Circuit noted that section 510, like the FLSA provision, includes the phrase “testified or is about to testify.”<sup>281</sup> The court concluded that this language suggests that section 510’s reference to “inquir[ies] or proceed[ing]s” applies to “legal or administrative” proceedings, or at the very least, “something more formal than written or oral complaints to a supervisor.”<sup>282</sup> Relying on this interpretation, the court found that section 510 did not protect King because she filed only internal complaints with her supervisors, and did not testify or give information in what the Fourth Circuit viewed as an “inquiry or proceeding.”<sup>283</sup>

The court found the Ninth Circuit’s holding in *Hashimoto* and the Fifth Circuit’s holding in *Anderson* “unpersuasive.”<sup>284</sup> The Fourth Circuit criticized *Hashimoto* as driven by policy, rather than any statutory analysis.<sup>285</sup> The court noted that the language of section 510 is clear and thus could not be “fairly construed” to extend to internal complaints, even if policy concerns dictated otherwise.<sup>286</sup>

Because section 510 did not protect King, her state law claim could not be re-categorized as a federal claim under ERISA.<sup>287</sup> As a result, removal

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273. *See id.* at 426–28.

274. *See id.*

275. *See id.* at 427.

276. 29 U.S.C. § 215(a)(3) (2006).

277. 228 F.3d 360 (4th Cir. 2000).

278. *Id.* at 364.

279. *Id.*

280. *Id.*

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

282. *Id.*

283. *Id.* at 427–28.

284. *Id.* at 428; *see supra* Part II.A (discussing the holdings in *Hashimoto* and *Anderson*).

285. *See King*, 337 F.3d at 428 & n.4.

286. *See id.* at 428.

287. *Id.*; *see supra* Part I.A.5 (discussing ERISA preemption).

to federal court was incorrect and the court remanded the case to state court for further proceedings.<sup>288</sup>

### C. *The Second Circuit's Middle Ground*

In *Nicolaou v. Horizon Media, Inc.*,<sup>289</sup> the Second Circuit took a middle ground regarding section 510's reach.<sup>290</sup> While the court stopped short of holding that section 510 protects all internal complaints, the court found that section 510 protects internal complaints that are made as part of an ongoing "inquiry or proceeding."<sup>291</sup>

Plaintiff Chrystina Nicolaou served as a fiduciary and trustee of Horizon Media's 401(k) plan.<sup>292</sup> In 1998, shortly after she began work at Horizon, Nicolaou discovered a "payroll discrepancy involving underpayment of overtime" to certain employees.<sup>293</sup> Nicolaou determined that this discrepancy was causing an underfunding of the 401(k) plan.<sup>294</sup> She informed multiple supervisors at Horizon of her concerns, and they told her to ignore the problem.<sup>295</sup> Nicolaou then contacted Mark Silverman, an attorney for Horizon, and asked him to look into the issue.<sup>296</sup> After performing his own investigation, Silverman confirmed Nicolaou's claims.<sup>297</sup> Nicolaou and Silverman then met with William Koenigsberg, the President of Horizon Media, and discussed the problem.<sup>298</sup> Shortly after the meeting, Nicolaou was demoted from her position as Director of Human Resources, and was ultimately terminated in November 2000.<sup>299</sup>

Nicolaou brought an action under section 510 claiming that Horizon wrongfully demoted and terminated her.<sup>300</sup> The district court dismissed her claim, holding that section 510 did not protect her because she was participating in an internal inquiry.<sup>301</sup> Just as the Fourth Circuit in *King* relied on its prior interpretation of the FLSA,<sup>302</sup> the district court relied on the Second Circuit's interpretation of the FLSA in *Lambert v. Genesee*

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288. *King*, 337 F.3d at 428. After remand, King argued that her termination was in violation of public policy and should thus be protected by Maryland's public policy exception to the at-will employment doctrine. *See King v. Marriott Int'l, Inc.*, 866 A.2d 895, 903 (Md. Ct. Spec. App. 2005). The Court of Special Appeals of Maryland rejected this argument, finding that King's discharge did not violate public policy. *See id.* at 906.

289. 402 F.3d 325 (2d Cir. 2005).

290. *See id.* at 330.

291. *Id.*

292. *Id.* at 326.

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.* at 326–27.

300. *Id.* at 327.

301. *Id.*

302. *See supra* Part II.B.

*Hospital*,<sup>303</sup> where the Second Circuit had held that the FLSA whistleblower provision applied only to formal complaints.<sup>304</sup>

In reviewing the district court's dismissal, the Second Circuit concluded that *Lambert* was not controlling because section 510's plain language is "unambiguously broader" than the language of its FLSA counterpart.<sup>305</sup> The court noted that while the FLSA extends protection to anyone who "has filed any complaint or instituted or caused to be instituted any proceeding under or related to" the FLSA, section 510 applies to "any *inquiry* or proceeding" related to ERISA.<sup>306</sup> While a "proceeding" refers to the "progression of a lawsuit or other business before a court,"<sup>307</sup> an "inquiry" refers to a "request for information."<sup>308</sup> The court reasoned that Congress intended to protect the "informal gathering of information" by extending section 510's protection to "*any inquiry*."<sup>309</sup>

The court remanded the case to the district court to determine whether Nicolaou was actually taking part in an inquiry or proceeding at the time the alleged retaliation occurred.<sup>310</sup> The court noted, however, that section 510 would protect Nicolaou if she could demonstrate that the purpose of her meeting with Koenigsberg was to discuss the plan's underfunding.<sup>311</sup>

The Second Circuit distinguished its holding from the Fourth Circuit's holding in *King*.<sup>312</sup> Unlike the Fourth Circuit, which held that section 510 only protects formal, external complaints, the Second Circuit stated that the court's focus should not be on the "formality or informality of the circumstances under which an individual gives information," but rather, on whether an inquiry is taking place when the individual gives information.<sup>313</sup> Because Nicolaou's meeting with Koenigsberg could potentially be construed as part of an inquiry, Nicolaou had asserted an actionable claim under section 510.<sup>314</sup>

In a concurring opinion, Judge Rosemary Pooler asserted that the majority decision did not extend the protections of section 510 far enough.<sup>315</sup> Judge Pooler argued that the court should have focused on

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303. 10 F.3d 46 (2d Cir. 1993).

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

305. *Id.*

306. *See id.* Compare 29 U.S.C. § 215(a)(3) (2006), with *id.* § 1140.

307. *See Nicolaou*, 402 F.3d at 329 (citing BLACK'S LAW DICTIONARY 1241 (8th ed. 2004); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1807 (1993)).

308. *See id.* (citing BLACK'S LAW DICTIONARY 808 (8th ed. 2004); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1167 (1993)).

309. *See id.* at 328–29.

310. *Id.* at 330.

311. *See id.* Although the court on remand determined that Nicolaou was participating in an "inquiry" when she was terminated, it still granted summary judgment to Horizon Media because Nicolaou could not establish that Horizon terminated her as a result of her participation in the inquiry. *See Order* at 17–20, *Nicolaou v. Horizon Media Inc.*, No. 01 Civ. 0785 (S.D.N.Y. May 19, 2008), ECF No. 71.

312. *See Nicolaou*, 402 F.3d at 330; *see also supra* Part II.B (describing the Fourth Circuit's holding in *King*).

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

314. *Id.*

315. *See id.* at 330 (Pooler, J., concurring).

Nicolaou's status as an ERISA fiduciary.<sup>316</sup> She reviewed the duties of an ERISA fiduciary and argued that fiduciaries should be protected when they perform their own investigations.<sup>317</sup>

Judge Pooler noted that restricting section 510's protections to formal external inquiries would leave fiduciaries few options to deal with potential breaches.<sup>318</sup> A fiduciary could take no action and potentially face personal liability under sections 405 and 409.<sup>319</sup> In the alternative, the fiduciary could notify a superior and face the prospect of retaliation,<sup>320</sup> or the fiduciary could inform a regulatory agency and hope that the superiors did not find out about this until after the agency began its own inquiry.<sup>321</sup> Lastly, the fiduciary could bring a civil action under section 502(a)(3) to enjoin the illegal actions.<sup>322</sup> Judge Pooler posited that "ERISA's framers [did not] intend[] to place fiduciaries in such an unenviable position."<sup>323</sup> Instead, she asserted that it was logical to infer that if a fiduciary has the right to sue to prevent ERISA violations, the fiduciary has a right to inform the plan administrator of such violations without fear of retaliation.<sup>324</sup>

Judge Pooler argued that as a fiduciary, Nicolaou should have been protected from the moment she began investigating the plan's funding problems, not merely because she met with Koenigsberg.<sup>325</sup> Judge Pooler asserted that if fiduciaries are not provided with such protection, they might be discouraged from vigorously carrying out their duties.<sup>326</sup>

#### *D. The Third Circuit: Section 510 Does Not Protect Unsolicited Internal Complaints*

The Third Circuit is the most recent circuit to consider the question of whether section 510 extends to internal complaints. In *Edwards v. A.H. Cornell & Son, Inc.*,<sup>327</sup> plaintiff Shirley Edwards claimed that her employer terminated her after she complained to management about ERISA violations.<sup>328</sup> Edwards was the Director of Human Resources at A.H. Cornell, as well as a participant in the company's group health plan.<sup>329</sup> Edwards discovered that A.H. Cornell was "administering the group health plan on a discriminatory basis, misrepresenting to . . . employees the cost of group health coverage in an effort to dissuade employees from opting into

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316. *See id.* at 330–31.

317. *See id.* at 330–32.

318. *See id.* at 331.

319. *See id.*; *see also supra* Part I.A.3 (describing ERISA fiduciary liability).

320. *See Nicolaou*, 402 F.3d at 331 (Pooler, J., concurring).

321. *See id.*

322. *See id.*; *see also supra* Part I.A.4 (describing ERISA's civil enforcement framework).

323. *Nicolaou*, 402 F.3d at 332 (Pooler, J., concurring).

324. *Id.*

325. *Id.*

326. *Id.*

327. 610 F.3d 217 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 1604 (2011).

328. *Id.* at 218.

329. *Id.*

benefits, and enrolling non-citizens in its ERISA plans.”<sup>330</sup> Edwards objected to company management about these practices and was terminated shortly thereafter.<sup>331</sup> She then brought an action claiming that A.H. Cornell violated section 510 of ERISA.<sup>332</sup> The district court, relying on the Second Circuit’s holding in *Nicolaou*, dismissed Edwards’ complaint, holding that no one requested any information from Edwards and thus she was not participating in an “inquiry or proceeding” at the time of her termination.<sup>333</sup> On review, the Third Circuit held that section 510 does not protect unsolicited internal complaints.<sup>334</sup>

The court first analyzed the plain language of section 510 to determine the meaning of the word “inquiry” as used in the statute.<sup>335</sup> The Secretary of Labor argued in its amicus brief that an unsolicited internal complaint to management should be considered part of an “inquiry or proceeding” because an informal inquiry is often the first step before a more formal inquiry is commenced.<sup>336</sup> The court rejected the Secretary’s argument, noting that *Black’s Law Dictionary* defines an inquiry as a “request for information.”<sup>337</sup> Because Edwards’s complaints and objections were unsolicited, she was not responding to a request for information.<sup>338</sup> The court also rejected Edwards’s argument that her objections and complaints constituted an “inquiry.”<sup>339</sup> The court reasoned that because the statute only protects employees who “give[] information” and not employees who “receive[] information,” the term “inquiry” only refers to “inquiries made of an employee, not inquiries made by an employee.”<sup>340</sup>

The court found the holdings in *Hashimoto* and *Anderson* unpersuasive because they did not closely examine the statutory language.<sup>341</sup> Instead, the court agreed with the Fourth Circuit’s holding in *King* that the statutory language limited section 510’s protections to “more formal actions.”<sup>342</sup> The court noted that its prior interpretations of the FLSA should not control its interpretation of section 510 because the statutes are “not identical.”<sup>343</sup> The court compared the text of section 510 to that of other anti-retaliation statutes and found that not all anti-retaliation statutes are limited to “more

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330. *Id.* at 219.

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.* at 218.

335. *See id.* at 222–24.

336. *See id.* at 222–23 (citing Brief for the Secretary of Labor as Amicus Curiae in Support of Appellant for Reversal at 16, *Edwards*, 610 F.3d 217 (No. 09-3198), 2009 WL 6870704, at \*24).

337. *Id.* at 223 (citing BLACK’S LAW DICTIONARY 864 (9th ed. 2009)).

338. *See id.*

339. *See id.*

340. *See id.*

341. *See id.* The court noted that the Fifth Circuit in *Anderson* only “gave the issue cursory treatment,” and the Ninth Circuit focused on a “fair interpretation” rather than the statutory text. *See id.*

342. *See id.* The court did not address the level of formality required to constitute an inquiry. *See id.* at 223 n.7.

343. *See id.* at 224.

formal actions.”<sup>344</sup> The court specifically noted that Title VII’s anti-retaliation provision contains broader language than section 510, thus demonstrating that Congress explicitly provides broader protection to employees in other circumstances.<sup>345</sup>

Edwards and the Secretary of Labor argued that the court should read section 510 broadly because ERISA is a remedial statute.<sup>346</sup> The Third Circuit rejected this argument.<sup>347</sup> Although the court acknowledged that ERISA provisions should be “liberally construed” when the statutory text is ambiguous, here the plain meaning of section 510 was “unambiguous,” and thus the court would not liberally construe the statute.<sup>348</sup> The court rejected the argument that the failure to protect unsolicited internal complaints would undermine section 510, asserting that Congress could have worded the statute differently if it was concerned about the lack of protection.<sup>349</sup>

Judge Robert Cowen dissented from the court’s holding, arguing that section 510 protects “unsolicited internal complaints to management.”<sup>350</sup> He disagreed with the majority’s characterization of section 510’s statutory language as unambiguous.<sup>351</sup> Judge Cowen noted that Congress viewed section 510 as essential to ERISA because ““without it, employers would be able to circumvent the provision of promised benefits.””<sup>352</sup> He argued that Congress could not have intended to deny protection to employees who notify their employer about ERISA violations.<sup>353</sup>

Judge Cowen criticized the majority for narrowly interpreting the term “inquiry.”<sup>354</sup> He noted that the court at times seemed to adopt the holding from *King* that only external complaints are protected, and at other times seemed to adopt the holding from *Nicolaou* that section 510 protects employees only after an internal investigation commences.<sup>355</sup> Judge Cowen specifically criticized the Second Circuit’s holding in *Nicolaou* as “unworkable in certain circumstances.”<sup>356</sup> He explained that an employee could complain to a supervisor about ERISA violations, and the supervisor

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344. *See id.* at 223.

345. *See id.* The court specifically noted that, unlike section 510, Title VII’s anti-retaliation provision provides protection to an employee who ““oppose[s] any practice made an unlawful employment practice by [Title VII].”” *Id.* (second alteration in original) (quoting 42 U.S.C. § 2000e-3(a) (2006)).

346. *See id.*; *see also* Brief of Appellant at 9–10, *Edwards*, 610 F.3d 217 (No. 09-3198), 2009 WL 6870703, at \*9–10; Brief for the Secretary of Labor, *supra* note 336, at 16; *cf.* *Rettig v. Pension Benefit Guar. Corp.*, 744 F.2d 133, 155 n.54 (D.C. Cir. 1983); *Kross v. W. Electric Co.*, 701 F.2d 1238, 1242–43 (7th Cir. 1983).

347. *See Edwards*, 610 F.3d at 223.

348. *See id.* at 223–24; *cf.* *Wolk v. UNUM Life Ins. of Am.*, 186 F.3d 352, 356 (3d Cir. 1999).

349. *See Edwards*, 610 F.3d at 224.

350. *Id.* at 226 (Cowen, J., dissenting).

351. *Id.*

352. *See id.* at 226–27 (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 143 (1990)).

353. *See id.* at 227.

354. *See id.* at 227–28.

355. *See id.* at 227.

356. *Id.*

could respond by asking the employee follow up questions.<sup>357</sup> Judge Cowen asked whether section 510 protects an employee who responds to the supervisor's follow-up questions.<sup>358</sup> He reasoned that if section 510 does not protect the employee, the supervisor would have an incentive to terminate the employee instead of conducting an investigation into the allegations.<sup>359</sup>

Judge Cowen also took issue with the majority's holding that section 510 protects only individuals who give information, and not those individuals who receive information.<sup>360</sup> He argued that the court's failure to protect individuals who conduct inquiries would leave a whole group of employees unprotected.<sup>361</sup> Employees who conduct investigations into ERISA violations need protection more than employees who simply answer questions from supervisors.<sup>362</sup> Judge Cowen concluded his dissent by arguing that analogous Third Circuit precedent interpreting other anti-retaliation statutes demonstrates that section 510 is ambiguous and thus should be given a broad interpretation.<sup>363</sup>

The extent of section 510's protections within the Third Circuit is still unsettled. As Judge Cowen noted, certain parts of *Edwards* seem to adopt the Fourth Circuit's holding in *King* that only formal external complaints are protected, while at other times it appears to agree with the position taken by the Second Circuit in *Nicolaou*.<sup>364</sup> Judge Jan E. DuBois of the U.S. District Court for the Eastern District of Pennsylvania recently ruled that *Edwards* holds only that section 510 does not protect "unsolicited internal complaints," and that section 510 "unambiguously" protects solicited internal complaints.<sup>365</sup> Such a ruling appears in conflict with the Fourth Circuit's holding in *King* that section 510 protects only employees who give information in a "legal or administrative" setting.<sup>366</sup>

### III. SECTION 510 OF ERISA SHOULD PROTECT INTERNAL WHISTLEBLOWERS IN CERTAIN INSTANCES

Part III of this Note considers the reach of section 510 of ERISA. This part first considers whether the statutory text is ambiguous and thus whether a broad reading of the statute is available. Next, it analyzes whether policy concerns dictate that section 510 protect internal complaints. It considers what steps an ERISA fiduciary must take to obtain protection under section 510. It then analyzes the circumstances under which section 510 protects a participant or beneficiary. This part concludes by considering what

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357. *See id.* at 228.

358. *Id.*

359. *Id.*

360. *See id.*

361. *See id.*

362. *See id.*

363. *See id.* at 228–29.

364. *See id.* at 227; *see also supra* Part II.B–C.

365. *See Garson v. HVAC Corp.*, No. 10-1612, 2010 U.S. Dist. LEXIS 119186, at \*8–9 (E.D. Pa. Nov. 8, 2010).

366. *See supra* Part II.B.

recourse section 510 provides an individual who is not a participant, beneficiary, or fiduciary, and proposes an amendment to ERISA to ensure protection for all ERISA whistleblowers.

*A. Section 510's Language Is Ambiguous*

Contrary to the Fourth Circuit's holding,<sup>367</sup> the language of section 510 is ambiguous. The Fourth Circuit's decision in *King*, that section 510 protects only formal external complaints, was based on the court's comparison of ERISA and the FLSA.<sup>368</sup> But the FLSA whistleblower provision protects employees only when they give information in a "proceeding," in contrast to ERISA, which protects employees participating in an "inquiry" or a "proceeding."<sup>369</sup> In *Nicolaou* and *Edwards*, both the Second and Third Circuits determined that their prior interpretations of the FLSA statute did not control their interpretation of section 510.<sup>370</sup> The disagreement between the circuits on section 510's reach demonstrates the ambiguity in the statute's construction.<sup>371</sup> Judge Cowen is correct that the wording of the statute is ambiguous and that, because ERISA is a remedial statute, section 510 deserves as broad a reading as possible.<sup>372</sup>

*B. The Necessity of Providing Internal ERISA Whistleblowers Broad Protections*

Before further considering section 510's reach, it is necessary to consider whether individuals who make either solicited or unsolicited internal complaints should be protected as a matter of public policy. Some commentators and courts have asserted that internal whistleblower complaints should not be protected because they do not further "public policy."<sup>373</sup> But protecting internal complaints about ERISA violations does advance public policy goals. First, by passing ERISA, Congress specifically determined that protecting private benefit funds is an area of federal concern.<sup>374</sup> Defined benefit pension fund finances are also a public concern. If a violation is publicly disclosed, the employer may suffer public relations damage.<sup>375</sup> The damage from the disclosure could financially harm the company,<sup>376</sup> which could compromise the employer's ability to fulfill its obligations to the pension fund. The PBGC may be required to take control of the fund if it fails.<sup>377</sup> Given concerns about the PBGC's finances in recent years,<sup>378</sup> it is in the public's interest that

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367. *See supra* Part II.B.

368. *See supra* Part II.B.

369. *See supra* Part II.B. Compare 29 U.S.C. § 215(a)(3) (2006), with *id.* § 1140.

370. *See supra* Part II.C–D.

371. *See supra* Part II.

372. *See supra* notes 350–63 and accompanying text.

373. *See supra* notes 171–75 and accompanying text.

374. *See supra* notes 31–32 and accompanying text.

375. *See supra* notes 156–58 and accompanying text.

376. *See supra* notes 155–59 and accompanying text.

377. *See supra* notes 50–57 and accompanying text.

378. *See supra* note 57 and accompanying text.

companies deal with complaints internally rather than in public where they could adversely affect the company.<sup>379</sup> A public disclosure might also affect the company's stock price.<sup>380</sup> A drop in stock price may harm the company's shareholders, which may include employees who own company stock through employee stock ownership plans.<sup>381</sup>

Most importantly, because whistleblowers prefer to report internally,<sup>382</sup> they are less likely to report violations if they are required to go outside the organization to make the report. In such cases, it is possible that no one will find out about the problem until the situation becomes dire.<sup>383</sup> If individuals like Chrystina Nicolaou who discover problems with plan funding are discouraged from reporting violations, there is a possibility that no one will find out about the situation until the plan is unable to fulfill its payment obligations.<sup>384</sup>

Protecting internal disclosures is consistent with ERISA's goal of providing federal regulation of private plans while still maintaining private control.<sup>385</sup> Forcing employees to report externally undermines this goal because it takes the ability to remedy the situation out of the company's hands.

### C. Who Section 510 Protects

#### 1. A Proposed Standard for ERISA Fiduciaries

ERISA imposes on fiduciaries an extremely high standard of conduct,<sup>386</sup> and a fiduciary who does not adhere to that standard may be held personally liable.<sup>387</sup> ERISA fiduciaries who discover ERISA violations have a duty to remedy those violations.<sup>388</sup> Section 510 must protect a fiduciary whenever he or she provides information to a supervisor about an ERISA violation. Accordingly, section 510 should be read broadly to prohibit an employer from terminating a fiduciary for expressing concerns about potential ERISA violations.

To understand the rationale for broadly interpreting section 510, it is important to consider the circumstances under which a fiduciary might find it necessary to make an internal complaint. First, ERISA requires a fiduciary who discovers that a co-fiduciary is violating ERISA to take steps to remedy the violations.<sup>389</sup> In some cases, this may require that the fiduciary notify a supervisor to remedy the breach.<sup>390</sup> If section 510 does

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379. *See supra* notes 156–57 and accompanying text.

380. *See supra* notes 155–57 and accompanying text.

381. *See supra* notes 156–57 and accompanying text.

382. *See supra* note 160 and accompanying text.

383. *See supra* note 158 and accompanying text.

384. *See supra* Part II.C.

385. *See supra* notes 33–34 and accompanying text.

386. *See supra* Part I.A.3.

387. *See supra* note 79 and accompanying text.

388. *See supra* notes 80–87 and accompanying text.

389. *See supra* notes 80–87 and accompanying text.

390. *See supra* Part I.A.3.

not protect this fiduciary, he or she would be forced to risk his or her livelihood to remedy the violations.<sup>391</sup> Although the fiduciary could bring a civil action under section 502(a)(3) to stop the violations,<sup>392</sup> this might not be the best way to remedy the breach. For example, a violation may need to be dealt with quickly, and the only way for the fiduciary to do that might be to notify a supervisor. Further, a fiduciary who chooses not to report the violation to a supervisor out of fear of retaliation may violate the statutory duty to act in the exclusive interests of plan participants and beneficiaries.<sup>393</sup> In that case, the fiduciary could face liability under section 409.<sup>394</sup>

A second situation to consider is whether a fiduciary is protected if he or she reports to management that a participant or beneficiary has notified the fiduciary about an ERISA violation. In that case, the fiduciary responsibility standards seem to require that the fiduciary at least investigate the concerns.<sup>395</sup>

Finally, ERISA requires fiduciaries to disclose information to plan participants in certain situations,<sup>396</sup> and some courts have extended this duty to instances where a company considers plan changes that may affect participants' retirement decisions.<sup>397</sup> Because this disclosure is required whether or not supervisors at the company want to disclose the information,<sup>398</sup> it seems logical that ERISA should protect a fiduciary who discloses the information against the employer's wishes. Similarly, ERISA should protect a fiduciary who is attempting to prevent ERISA violations, even if this attempt is against the employer's wishes.

Under the Ninth and Fifth Circuit's interpretation of the statute, section 510 protects the fiduciary in almost all of the above scenarios.<sup>399</sup> The Second, Third, and Fourth Circuit interpretations, however, leave fiduciaries unprotected in a variety of instances.<sup>400</sup> The Fourth Circuit's holding that section 510 only protects "formal" inquiries in a "legal or administrative" setting does not appear to protect a fiduciary in any of the situations discussed above.<sup>401</sup> The Second Circuit interpretation is problematic because it grants protection only when an inquiry is actually taking place, and a court may determine that a fiduciary performing his or her own investigation is not actually conducting an "inquiry."<sup>402</sup> The Third

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391. See *supra* notes 177–79 and accompanying text.

392. See 29 U.S.C. § 1132(a)(3) (2006); *supra* note 95 and accompanying text.

393. See *supra* notes 63–69 and accompanying text.

394. See *supra* note 79 and accompanying text.

395. See *supra* notes 63–69 and accompanying text.

396. See *supra* notes 72–77 and accompanying text.

397. See *supra* note 75 and accompanying text.

398. See *supra* Part I.A.3.

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

400. See *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 223 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 1604 (2011); *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 330 (2d Cir. 2005); *King v. Marriott Int'l, Inc.*, 337 F.3d 421, 428 (4th Cir. 2003); *supra* Part II.B–D.

401. See *King*, 337 F.3d at 428; *supra* Part II.B.

402. See *Nicolaou*, 402 F.3d at 330; *supra* Part II.C.

Circuit standard suffers from both of the faults contained in the Second and Fourth Circuits' interpretations.<sup>403</sup>

Judge Pooler correctly noted in her concurring opinion in *Nicolaou* that ERISA fiduciary responsibility is undermined if no protection is afforded to ERISA fiduciaries who express concerns internally.<sup>404</sup> Any other reading is inconsistent with ERISA fiduciary conduct standards,<sup>405</sup> and would hamper a fiduciary's ability to remedy violations. If employers face no consequences for dismissing fiduciaries who express concerns about ERISA violations, fiduciaries will hesitate to investigate the violations. Such a result will be detrimental to plan participants and beneficiaries, and potentially the public, and would be inconsistent with the general goals of ERISA.<sup>406</sup>

## 2. Participants and Beneficiaries

The next step is to determine what type of protection a participant or beneficiary should be entitled to if terminated for notifying his or her employer about potential ERISA violations.

One of the key goals of ERISA is to protect the benefits of participants and beneficiaries.<sup>407</sup> ERISA's protections were specifically designed with events such as the Studebaker pension shortfall in mind.<sup>408</sup> It is consistent with this protective purpose to encourage participants and beneficiaries to express concerns they may have about the plan. They should feel free to do so without fear of retaliation.

Unlike fiduciaries, participants and beneficiaries are not engaging in any inquiry when going about their daily routines, as they have no statutory obligation to correct ERISA violations.<sup>409</sup> Thus, it must be determined what conduct by a participant or beneficiary constitutes an "inquiry or proceeding."

Section 510 should be interpreted to protect a participant or beneficiary who notifies an ERISA fiduciary in writing about an ERISA violation. Section 510 expressly protects individuals who "give[] information."<sup>410</sup> Because a fiduciary has a duty to investigate the alleged misconduct,<sup>411</sup> it seems logical that providing written notice to a fiduciary should constitute the beginning of the inquiry. Requiring that the complaint be in writing will circumvent any later claim that the complaint was never actually filed.<sup>412</sup>

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403. See *Edwards*, 610 F.3d at 223; *supra* Part II.D.

404. See *supra* notes 315–26 and accompanying text.

405. See *supra* notes 63–69 and accompanying text; see also *supra* notes 315–26 and accompanying text.

406. See *supra* Part I.A.1–2.

407. See *supra* Part I.A.1–2.

408. See *supra* Part I.A.1.

409. See *supra* Part I.C.

410. See 29 U.S.C. § 1140 (2006); *supra* Part I.C.

411. See *supra* notes 79–87 and accompanying text.

412. See *supra* note 167 and accompanying text (discussing concerns about employees fabricating complaints to justify retaliation claims).

### 3. Individuals who Are Not Participants, Beneficiaries, or Fiduciaries

Section 510 specifically prohibits an employer from discharging “any person” who gives information about an inquiry or proceeding relating to ERISA,<sup>413</sup> and ERISA defines a “person” as an “individual.”<sup>414</sup> Unfortunately, section 502(a), the enforcement mechanism for section 510, does not provide a right of action for an individual who is not a participant, beneficiary, or fiduciary.<sup>415</sup> Because courts treat the list of plaintiffs in section 502(a) as exhaustive, an individual who is a company employee but not a participant or beneficiary in the ERISA plan, or a plan fiduciary, has no standing to assert a claim under sections 510 and 502(a).<sup>416</sup> This lack of protection applies to external and internal whistleblowers.

The individual can look to state law for relief, but that may be problematic because of preemption.<sup>417</sup> A state court may determine that ERISA preempts any state law claim on the issue even though ERISA provides no remedy.<sup>418</sup> Even if ERISA does not preempt a state law claim on the issue, the individual may not be able to obtain a remedy because of the hodgepodge of state laws protecting whistleblowers.<sup>419</sup> Thus, such an individual may find protection in one state but not in another.<sup>420</sup>

There is a strong policy argument that ERISA should protect those whistleblowers who cannot bring an action under section 502(a). These whistleblowers may place their careers and livelihoods in jeopardy by blowing the whistle on ERISA violations.<sup>421</sup> They are only seeking to help others, as they have nothing to gain in ensuring that the violations are corrected. They have no rights to benefits like participants and beneficiaries,<sup>422</sup> and they cannot be held personally liable like fiduciaries.<sup>423</sup> They are also helping the company by disclosing the problems internally as opposed to externally.<sup>424</sup> Finally, if the protection of employee benefits is truly a federal concern, then it follows that federal law should provide protection to individuals who seek to remedy ERISA violations, whether or not they are participants in the plan.

#### *D. A Legislative Solution to the Conflict*

Congress should amend ERISA to specifically provide protection to internal whistleblowers, and to protect all individuals who report ERISA violations. Such an amendment would have two key components.

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413. See 29 U.S.C. § 1140; *supra* Part I.C.

414. See 29 U.S.C. § 1002(9).

415. See *id.* § 1132(a); *supra* Part I.A.4.

416. See *supra* notes 98–99 and accompanying text.

417. See *supra* Part I.A.5.

418. See *supra* notes 206–09 and accompanying text.

419. See *supra* Part I.B.2–3.

420. See *supra* Part I.B.2–3.

421. See *supra* notes 177–79 and accompanying text.

422. See *supra* Part I.A.2.

423. See *supra* notes 79–87 and accompanying text.

424. See *supra* notes 155–59 and accompanying text.

First, section 510 should be amended to specifically protect internal whistleblowers. This can be accomplished by rewording the language of the statute to protect any person who gives information “internally or externally” or testifies or is about to testify in any “internal or external” inquiry or proceeding relating to ERISA. Such language clarifies that the statute’s protections extend beyond formal external complaints.

Second, section 502(a) should be amended to provide a cause of action to an individual who is not a participant, beneficiary, or fiduciary, and who is terminated for reporting ERISA violations. Congress should add a new subsection to the statute permitting a cause of action “by any person for appropriate equitable relief in the case of a violation of” section 510. This amendment would provide a cause of action under ERISA to anyone terminated for reporting a violation, regardless of the individual’s status in relation to the plan.<sup>425</sup>

#### CONCLUSION

It is important that ERISA protect all individuals who report ERISA violations. The extent of protection should not depend on whether the report is made internally or externally. As this Note discussed, protecting merely external complaints not only conflicts with ERISA’s aims and goals, but is also harmful to the very individuals ERISA is designed to protect. Section 510 should protect all individuals who make complaints internally. This Note offers a solution to the conflict surrounding section 510’s reach. It proposes an interpretation of ERISA that furthers the statute’s aims and goals while protecting whistleblowers, and also proposes an amendment to ERISA that expands this protection. This approach will help to ensure the protection of important employee benefits.

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