Play through the Whistle: the Scope of Anti-Retaliation Protection for Employee Complaints Pursuant to Erisa Section 510

James Coughlin
PLAY THROUGH THE WHISTLE: THE SCOPE OF ANTI-RETAILIATION PROTECTION FOR EMPLOYEE COMPLAINTS PURSUANT TO ERISA SECTION 510

“There is an old saying: Keep playing until you hear the whistle . . . .” – Ray Lewis

I. INTRODUCTION

In the traditional employment relationship, either the employee or the employer may terminate the relationship for any reason, unless there is a contrary agreement. During the past half-century, American courts began creating exceptions to the at-will employment doctrine for employee terminations that violated public policy. Simultaneously, Congress began enacting statutes in furtherance of various public policy considerations, providing employees with protection from termination or adverse employment action for certain types of employee conduct. One example of a federal statute that includes a wrongful discharge cause of action in the form of an anti-retaliation provision designed to protect employee whistleblowers is the Employee Retirement Income Security Act of 1974.

1 See Horace G. Wood, A Treatise on the Law of Master and Servant § 134 (1877) (“[A] general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof . . . . [It is an indefinite hiring and is determinable at the will of either party.]”); Joseph C. Telezinski, Jr., Note, Without Warning—The Danger of Protecting “Whistleblowers” Who Don’t Blow the Whistle, 27 W. St. U. L. Rev. 397, 398-99 (1999-2000) (explaining employment-at-will doctrine applies unless employment contract is for specified term).

2 See Petermann v. Int’l Bhd. of Teamsters, 344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959) (adopting public policy exception to at-will employment doctrine). The court found that the employer wrongfully terminated its employee who it fired for his refusal to commit perjury before the California legislature. Id. But see Foley v. Interactive Data Corp., 765 P.2d 373, 380 (Cal. 1988) (rejecting public policy exception to at-will employment rule for internal complaints). The court reasoned that “[w]hen the duty of an employee to disclose information to his employer serves only the private interest of the employer, the rationale underlying the [public policy] cause of action is not implicated.” Id.; see also Clyde W. Summers, Employment At Will in the United States: The Divine Right of Employers, 3 U. Pa. J. Lab. & Emp. L. 65, 74 (2000) (noting limitation to public policy exception when public has no interest). Summers asserts that the exception “may be limited to those situations where the public’s health and safety are affected; it may not apply if only the internal affairs of the employer are involved.” Summers, supra, at 74.

Section 510 of ERISA provides protection to employees from termination, suspension, or discrimination in retaliation for providing information or testimony in any “inquiry or proceeding” related to ERISA. The federal circuit courts of appeals have reached different conclusions regarding the scope of employee action necessary to trigger the anti-retaliation provision of ERISA. This circuit split has led to inconsistent remedies for aggrieved plaintiffs who have suffered adverse employment action, including termination, as a result of internal complaints of alleged ERISA violations. Some circuits have held that an employee must partake in an actual governmental inquiry or proceeding, or a private suit regarding the employer’s alleged ERISA wrongdoing, to receive ERISA anti-retaliation protection. Alternatively, other circuits have ruled that information regarding an ERISA violation that is provided to an employer internally, alone suffices to trigger anti-retaliation protection under Section 510.

Part II of this Note addresses the history and enactment of ERISA, and analyzes the statutory language of Section 510 compared to other codified anti-retaliation provisions. Part III addresses the emergence of a circuit split among the federal circuit courts of appeals concerning what employee conduct is protected pursuant to Section 510. Part III.A discusses the circuit court decisions that have held that internal employee

---

5 29 U.S.C. § 1140 (2006) (“It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act.”).
6 See infra Part III.A-B (outlining emerging circuit split over interpretation of Section 510 regarding internal employee complaints).
7 See infra Part III.A-B.
9 See Anderson v. Elec. Data Sys. Corp., 11 F.3d 1311, 1314 (5th Cir. 1994) (holding internal complaints are protected by ERISA Section 510); see also Hashimoto v. Bank of Haw., 999 F.2d 408, 412 (9th Cir. 1993) (holding Section 510 protects employee internal complaints).
10 See infra Part II (outlining history of ERISA’s enactment and Section 510’s protection from retaliation).
11 See infra Part III (analyzing emerging circuit split concerning what action warrants Section 510 protection from retaliation).
complaints are protected from retaliation, and Part III.B addresses the circuit decisions that deny protection to employees who complain about alleged violations of ERISA internally to the employer. Finally, Part IV analyzes how the United States Supreme Court decision in *Kasten v. Saint-Gobain Performance Plastics Corp.*, which pertains to the scope of the Fair Labor Standards Act (“FLSA”) anti-retaliation provision, may catalyze an eventual Supreme Court decision to resolve the circuit split surrounding ERISA’s anti-retaliation protection.

This Note concludes that courts should interpret ERISA Section 510 narrowly and consistently with the plain meaning of the statute. A narrow interpretation of Section 510 would continue to protect employees who report alleged ERISA violations externally to the government, or who file private law suits. Until the Supreme Court rules on the scope of Section 510 protection, attorneys should counsel their clients to “play through the whistle” by reporting alleged violations of ERISA to the government, or institute a private suit, to obtain protection from retaliation.

II. HISTORICAL PERSPECTIVE OF ERISA

A. The Enactment of ERISA

Congress enacted ERISA in 1974 as a “comprehensive” federal statute designed to protect employee interests in benefits plans that employers provide to employees. Under ERISA, employee benefit plans include pension plans and welfare plans pertaining to employment.

---

12 See infra Part III.A-B.
14 See infra Part IV.E (addressing FLSA circuit split and Supreme Court decision).
15 See infra Part V (arguing for narrow interpretation of Section 510 protection based on plain meaning of statutory language).
16 See infra Part V.
17 See infra Part V (counseling attorneys to advise clients to “blow the whistle” and report alleged ERISA violations externally).
19 See Shaw, 463 U.S. at 90-91; see also 29 U.S.C. § 1002(2) (2006) (defining pension plans to provide deferred employee compensation); 29 U.S.C. § 1002(1) (2006) (welfare plans include...
Congress included various provisions designed to safeguard benefit plans and prevent employer abuse in ERISA’s broad statutory scheme.\textsuperscript{20} For example, ERISA mandates pension plan requirements concerning employee participation, funding, and vesting.\textsuperscript{21} The statute also includes standards regarding the reporting, disclosure, and fiduciary duties related to the management of welfare and pension plans.\textsuperscript{22} The regulations set forth under ERISA replaced state laws that were often inconsistent; thus, ERISA’s enactment led to uniformity with the administration and regulation of various employee benefit plans.\textsuperscript{23}

B. ERISA’s Anti-Retaliation Provision: Section 510

One of the measures that Congress implemented in ERISA to safeguard employee benefit plans and to prevent abuse by employers is the statute’s anti-retaliation provision encompassed in Section 510.\textsuperscript{24} The first provision of Section 510 prohibits an employer from taking adverse employment action against an employee who has exercised an entitled right under a benefit plan, and from interfering with an employee-entitled right under the plan.\textsuperscript{25} The second provision of Section 510 prohibits an employer from taking adverse employment action against an employee because that individual has provided information or testimony, or plans to testify, in "any inquiry or proceeding" related to ERISA.\textsuperscript{26} Section 510’s

benefits covering employee costs associated with “sickness, accident, disability, death or unemployment”).
\textsuperscript{20} See Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 137 (1990) (“Congress included various safeguards [in ERISA] to preclude abuse and ‘to completely secure the rights and expectations brought into being by this landmark reform legislation.’” (quoting S. REP. NO. 93-127, at 36 (1973))).
\textsuperscript{21} See Shaw, 463 U.S. at 91 (citing 29 U.S.C. §§ 1051-1086 (2006)).
\textsuperscript{22} See id. (citing 29 U.S.C. §§ 1021-1031, 1101-1114 (2006)).
\textsuperscript{23} See Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 11 (1987) (describing effect of ERISA’s enactment).
\textsuperscript{25} See id. (providing anti-retaliation protection relating to employee entitled rights).

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act.

Id.

\textsuperscript{26} See id. (providing protection from retaliation for employees who report alleged ERISA
ERISA SECTION 510

purpose is to protect the attainment of employee rights under ERISA.\footnote{27}{See Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 137 (1990) (stating Section 510 “proscribes interference with rights protected by ERISA”).} The focus of this Note is to interpret the second portion of the anti-retaliation provision contained in Section 510 and its impact on employees who report alleged violations of substantive ERISA regulations internally to an employer.\footnote{28}{See infra Part III (addressing circuit split over scope of ERISA anti-retaliation provision).}

C. The Scope of Section 510 in Comparison to Title VII’s Anti-retaliation Provision

While ERISA’s anti-retaliation provision provides broad protection in some circumstances to affected employees—e.g., when an employer attempts to deny benefits to any employee on a discriminatory basis—the statute does not provide extensive employee protection compared to other federal employment statutes with anti-retaliation provisions.\footnote{29}{Compare 29 U.S.C. § 1140 (protecting employees who partake in proceeding or inquiry), with 42 U.S.C. § 2000e-3(a) (2006) (providing protection to employees who oppose an employer action that Act deems unlawful).} For example, Section 704 of Title VII of the Civil Rights Act of 1964\footnote{30}{42 U.S.C. §§ 2000e-2000e-17 (2006).} extended broad statutory protection to individuals who manifest opposition internally to the employer regarding any employer action that is unlawful under Title VII.\footnote{31}{42 U.S.C. § 2000e-3(a) (2006). Title VII’s anti-retaliation provision captured in Section 704 reads as follows:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

> Id.} This Note contends that the anti-retaliation language of Section 510 of ERISA is limited to external complaints only, and, therefore, that Section 510 is consequently narrower in scope than the more expansive protection afforded under Section 704 of Title VII.\footnote{32}{See Edwards v. A.H. Cornell & Son, Inc., 610 F.3d 217, 224 (3d Cir. 2010) (reasoning Congress could have provided broader protection for employee internal complaints similar to Title VII).}
D. Statutory Interpretation: General Principles

The Supreme Court has established the general rule that statutory language should be regarded as conclusive unless Congress has manifested a clear intent otherwise. The first step in statutory analysis is determining whether the language is clear and has unambiguous meaning. If a court determines that the language is ambiguous on its face, it will then look to the surrounding language as well as the contextual application of the text.

III. CIRCUIT SPLIT SURROUNDING PROTECTABLE EMPLOYEE ACTION UNDER ERISA

The federal circuit courts of appeals that have interpreted the protection afforded to employees who make internal complaints to employers under ERISA Section 510 have reached divergent outcomes. Some circuits have found that internal employee complaints made to employers regarding alleged violations of ERISA alone merit protection under the anti-retaliation provision in Section 510. In contrast, other circuits have denied ERISA anti-retaliation protection to employees who only complained internally to their employer about alleged violations of the


35 See Atchison, 470 U.S. at 473 n.27 (setting forth measure courts take to interpret ambiguous statutory language); see also Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1330 (2011) (“[I]nterpretation . . . ‘depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.’” (quoting Delan v. U.S. Postal Serv., 546 U.S. 481, 486 (2006))).


37 See Anderson v. Elec. Data Sys. Corp., 11 F.3d 1311, 1314 (5th Cir. 1994) (finding discharge of employee for providing information relating to ERISA within Section 510’s scope); Hashimoto v. Bank of Haw., 999 F.2d 408, 411 (9th Cir. 1993) (finding effectiveness of anti-retaliation provision contingent upon ability to protect internal employee complaints).
A. Unsolicited Internal Complaints Constitute Protected Action Pursuant to Section 510 of ERISA—Fifth and Ninth Circuits

The first federal circuit to consider whether Section 510 of ERISA provided protection to employees who made internal complaints to their employers regarding ERISA wrongdoing was the United States Court of Appeals for the Ninth Circuit in Hashimoto v. Bank of Hawaii. The plaintiff in Hashimoto asserted that, on several occasions, she complained internally about alleged violations of ERISA’s requirements regarding reporting, disclosure, and fiduciary duties. The court held that the plaintiff’s state-law cause of action for wrongful discharge based on this internal reporting was preempted by ERISA’s broad preemption provision, and that ERISA in fact provided the remedy pursuant to Section 510. The Ninth Circuit recognized that the intent behind the anti-retaliation provision of ERISA was to provide protection to whistle blowers, including an individual in the plaintiff’s position, who made internal complaints about the alleged ERISA wrongdoing on the part of the employer, and who was subsequently fired for protesting the alleged violation.

Statute.38


39 999 F.2d 408, 409 (9th Cir. 1993) (considering whether employee internal complaint ERISA violation could raise state claim of wrongful discharge).

40 See id. at 409-10 (outlining internal complaints plaintiff made to supervisors regarding alleged ERISA violations committed by bank). The plaintiff’s specific internal complaints alleging violations of ERISA pertained to profit-sharing, severance, and pension plans. Id. at 410.

41 See id. at 411 (finding preemption because claim would force court to adjudicate claims related to ERISA).

42 See id. (finding Section 510 of ERISA protects internal complaints of ERISA violations made to employer). The court described the proper procedural steps taken by an employee to provide information regarding ERISA violations that may lead to adverse employment action against the employee at the hands of the employer. Id.

The normal first step in giving information or testifying in any way that might tempt an employer to discharge one would be to present the problem first to the responsible managers of the ERISA plan. If one is then discharged for raising the problem, the process of giving information or testifying is interrupted at its start: the anticipatory discharge discourages the whistle blower before the whistle is blown.
The United States Court of Appeals for the Fifth Circuit followed the reasoning of the Ninth Circuit when it decided *Anderson v. Electronic Data Systems Corp.*[^43] The plaintiff in *Anderson* was a cash fund manager responsible for approximately $1.3 billion in investments.[^44] He alleged that the defendant employer asked him to commit illegal acts under ERISA.[^45] He contended that his employer discharged him for refusing to violate the law and for his internal reporting of those illegal requests and other illegal conduct committed by a colleague.[^46] Analogous to the court’s reasoning in *Hashimoto*, the *Anderson* court held that the plaintiff’s state law cause of action for wrongful termination was preempted by ERISA.[^47] The Fifth Circuit concluded that ERISA’s anti-retaliation provision found in Section 510 provided the appropriate cause of action.[^48] The court further held that Section 510 broadly proscribes adverse employment action or discharge when an employee has “given information” related to ERISA.[^49]

**B. Unsolicited Internal Complaints Do Not Merit Protection under Section 510 of ERISA—Second, Third, and Fourth Circuits**

More recent decisions across the federal circuits have opposed the

[^43]: Id.
[^44]: Id. 11 F.3d 1311, 1312 (5th Cir. 1994) (considering whether plaintiff could raise state law retaliation claim regarding discharge for reporting ERISA violation).
[^45]: See id. (outlining plaintiff’s job title and employment responsibilities to defendant). Anderson’s position before his alleged wrongful termination was “Manager of Investments and Debt in the Domestic Treasury Department.” Id. Anderson was responsible for all “domestic short and long-term investments for all pension portfolios, corporate portfolios and Title IX portfolios.” Id.
[^46]: See id. (detailing alleged ERISA violations plaintiff reported internally to employer). The plaintiff alleged that he was asked to sign invoices for payment regarding pension portfolios without approval by the trustees of the pension plan. Id. Plaintiff also alleged that he was asked to record minutes for retirement plan meetings that he did not attend. Id. Finally, the plaintiff alleged that a co-worker, who dealt directly with the plans that the plaintiff managed and supervised, committed other ERISA wrongdoing. Id. at 1312-13.
[^47]: See id. at 1312-13 (explaining plaintiff’s retaliation claim). The plaintiff alleged that his employer demoted him from his investment manager position and that he was ultimately discharged for refusing to commit acts made illegal under ERISA, as well as for reporting internally the ERISA violations a co-worker had committed. Id. at 1313.
[^48]: Id. at 1313-14 (holding plaintiff’s wrongful discharge claim preempted because it pertained to alleged violations of ERISA). The court reasoned that the alleged retaliation was directly related to the plaintiff’s internal complaint regarding ERISA violations. Id.
[^49]: Anderson, 11 F.3d at 1313-14 (reasoning Anderson’s claims fell within scope of Section 510); see also Author v. Ginsberg, 757 F.2d 796, 802 (6th Cir. 1985) (disallowing state law claim as inconsistent with Congressional purpose creating uniformity regarding employee benefits plans).
reasoning outlined in the earlier Fifth and Ninth Circuit opinions, which discussed whether ERISA Section 510 protection is triggered by an employee’s internal complaint. The first federal circuit to hold that employee internal complaints do not trigger anti-retaliation protection pursuant to Section 510 was the United States Court of Appeals for the Fourth Circuit in King v. Marriott International, Inc. The plaintiff in King held various positions in the benefits department of the defendant employer, including Vice President of Benefits Resources, before the employer discharged her. The plaintiff contended that her discharge was due to her objection on multiple occasions to the transfer of money from a medical benefit fund to a general corporate fund, and that her discharge violated public policy in the State of Maryland. The King court held that the district court erred in finding the plaintiff’s state law cause of action preempted by ERISA’s preemption provision. The Fourth Circuit further concluded that Section 510 did not provide any protection for the plaintiff’s actions because the plaintiff did not participate in any inquiry or proceeding.

50 Compare Anderson, 11 F.3d at 1313-14 (finding employee discharge for providing information relating to ERISA within scope of Section 510), and Hashimoto v. Bank of Haw., 999 F.2d 408, 411 (9th Cir. 1993) (finding effectiveness of anti-retaliation provision contingent upon ability to protect employee internal complaints), with Edwards v. A.H. Cornell & Son, Inc., 610 F.3d 217, 218 (3d Cir. 2010) (holding based on statute’s language Section 510 does not protect unsolicited internal complaints from retaliation), Nicolaou v. Horizon Media, Inc., 402 F.3d 325, 330 (2d Cir. 2005) (holding internal complaint not a proceeding and must be solicited to constitute inquiry), and King v. Marriott Int’l, Inc., 337 F.3d 421, 427-28 (4th Cir. 2003) (holding “inquiry or proceeding” suggests limited protection to information given in formal proceeding).

51 337 F.3d at 423 (considering whether ERISA preempted plaintiff’s state law claim or if ERISA provided remedy).

52 Id. at 423 (highlighting plaintiff’s responsibilities with defendant employer). Plaintiff’s responsibilities included monitoring the finances of the benefit plans. Id.

53 Id. (outlining plaintiff’s state law cause of action for wrongful discharge). Plaintiff continually objected to the transfer of funds from the medical benefit plan into the corporation’s general account. Id.

54 Id. at 428 (concluding plaintiff’s state claim not completely preempted because ERISA did not provide remedy).

55 Id. at 427-28 (holding Section 510 protection triggered only when employee participates in formal legal or administrative proceeding). The court explained that the language in Section 510, including “testified or is about to testify,” suggests that the language “inquiry or proceedings” requires employee participation in a formal legal or administrative process to trigger protection from retaliation. Id. at 427. The court further reasoned that Section 510 provides employees with less protection than the anti-retaliation provision found in Title VII of the Civil Rights Act of 1964. Id.; see also Ball v. Memphis Bar-B-Q Co., 228 F.3d 360, 364 (4th Cir. 2000) (concluding FLSA did not provide broad anti-retaliation protection). The court reasoned that the more narrow language in the FLSA’s anti-retaliation provision is comparable to the language in Title VII’s anti-retaliation provision and called for a similarly narrow interpretation of the scope of FLSA protection. Id. The court in Ball found that “proceeding” referenced a legal or administrative
The Second Circuit considered whether Section 510 protects internal employee complaints in *Nicolaou v. Horizon Media, Inc.* The plaintiff in *Nicolaou* served as the human resources director for the defendant employer before her termination. The plaintiff discovered a problem with the employer’s payroll regarding the underpayment of overtime wages that resulted in the underfunding of 401(k) benefits to employees. She attempted to rectify the issue by reporting it to the company’s Controller, Chief Financial Officer, and company attorney, and by meeting with the company’s president, before the company terminated her employment. The Second Circuit overruled the district court’s decision that Section 510 did not protect employee participation in an informal internal inquiry, and held instead that solicited internal complaints may trigger Section 510 protection from retaliation. However, the court limited its holding by concluding that the plaintiff’s actions would fall into Section 510’s anti-retaliation protection for employees who partake in an inquiry only if the plaintiff’s meeting with the employer’s president had been initiated by the employer and not by the plaintiff.

In *Edwards v. A.H. Cornell & Son, Inc.*, the United States Court of Appeals for the Third Circuit addressed the issue of what action suffices to trigger the anti-retaliation provision contained in Section 510 of ERISA.

---

56 402 F.3d 325, 327-28 (2d Cir. 2005) (considering whether district court erred in dismissing plaintiff’s Section 510 claim).
57 Id. at 326 (outlining plaintiff’s position with defendant-employer). Plaintiff was a fiduciary of, and participant in, the employer’s 401(k) plan. Id.
58 Id. (detailing alleged ERISA violations plaintiff discovered).
59 Id. at 326-27 (outlining steps plaintiff took in reporting alleged ERISA violations internally).
60 Id. at 328-29 (reasoning Section 510 is “unambiguously broader in scope” than comparable FLSA section). The court relied on the terms “any inquiry or proceeding” in Section 510, which indicated a less formal connotation than the term “proceeding” found in the comparable FLSA anti-retaliation provision. Id. The court asserted that the term “inquiry” demonstrates the intent of Congress to protect participants in informal information gathering. Id. The court also highlighted how the use of both the terms “inquiry” and “proceeding” is indicative of Congress’s intent “to give the nouns their separate, normal meanings.” Id. at 329 (citing *Garcia v. United States*, 469 U.S. 70, 73 (1984)); see also *BLACK’S LAW DICTIONARY* 1324 (9th ed. 2009) (defining term “proceedings” as “the regular and ordinary progression of a law suit”); *BLACK’S LAW DICTIONARY* 864 (9th ed. 2009) (defining “inquiry” as “[a] request for information”).
61 Nicolaou, 402 F.3d at 330 (reasoning plaintiff’s meeting with company president constituted inquiry if solicited by employer). The court elucidated that the proper analysis is whether the situation may be fairly considered to be an “inquiry” and not the degree of formality. Id. But see id. at 330-31 (Pooler, J., concurring) (asserting plan fiduciaries are entitled to more protection pursuant to Section 510). The concurring opinion reasoned that fiduciaries have a duty to ensure the proper and appropriate functioning of the plan. Id. at 331.
62 610 F.3d 217, 218 (3d Cir. 2010) (considering whether employee’s internal unsolicited
In *Edwards*, the employer hired the plaintiff to create a human resources department and to serve as Human Resources Director. The plaintiff contended that her employer terminated her in violation of Section 510 for complaining to her superiors about alleged ERISA violations including discrimination in the administration of the health care plan. The Third Circuit held that internal complaints, which are not solicited by the employer, are not protected from retaliation under Section 510. The court reasoned that the protection of Section 510’s inquiry clause covers employees who *provided* information in an inquiry, not employees who *received* information through their own inquiry.

C. Statutory Interpretation: Plain Meaning of Section 510

The common issue pertaining to the circuit split regarding the scope of ERISA’s anti-retaliation protection is the interpretation of the phrase “inquiry or proceeding” in the text of Section 510. More specifically, the question that courts have addressed is whether information provided by employees internally to their employers constitutes

---

63 Id. (highlighting terms and conditions of plaintiff’s employment).
64 Id. at 219 (detailing plaintiff’s allegations of ERISA violations). The plaintiff specifically alleged that the defendant-employer did not accurately represent the cost of group health care in an attempt to deter employees from enrolling in the health care plan. Id. The plaintiff also alleged that the employer enrolled non-citizens in benefit plans through use of fraudulent social security identification numbers that were provided to insurance companies. Id.
65 Id. at 218. The court rejected the plaintiff’s argument that her unsolicited internal complaints and objections constituted an inquiry. Id. at 223. The court reasoned that the language “testified or is about to testify” indicates that the terms “inquiry or proceeding” pertain to formal actions. Id. (quoting King v. Marriott Int’l, Inc., 337 F.3d 421, 427 (4th Cir. 2003)). The court compared the language of Section 510 to the analogous anti-retaliation provision of Title VII, which protects employees who oppose unlawful employer actions. Id. at 223-24. The court concluded that Title VII provides for broader protection from retaliation than ERISA. Id.
66 Id. at 223 (reasoning that the plaintiff’s objections were statements and not requests for information). The court further noted that Congress could have expanded the protection afforded by Section 510 if it included broader anti-retaliation language comparable to Title VII. Id. The court also concluded that, because the protection afforded under the FLSA is not identical to language found in Section 510, decisions pertaining to the anti-retaliation provision in the FLSA are not dispositive. Id. at 224-25.
67 See, e.g., *Edwards*, 610 F.3d at 222 (considering whether information plaintiff gave to management was in an inquiry or proceeding); Nicolaou v. Horizon Media, Inc., 402 F.3d 325, 328-29 (2d Cir. 2005) (defining scope of statutory terms “inquiry” and “proceeding”); King v. Marriott Int’l, Inc., 337 F.3d 421, 427 (4th Cir. 2003) (considering scope of statutory language “inquiry or proceeding”).
participation in an “inquiry or proceeding.”68 For example, the King court refused to extend Section 510’s anti-retaliation protection to employees who filed internal complaints because the complaints did not involve participation in an “inquiry or proceeding,” which the court concluded connotes a higher degree of formality than a complaint to an employee’s supervisor.69 Conversely, the Nicolaou court held that the proper analysis is to determine whether the circumstances surrounding the production of information constituted an “inquiry,” rather than to assess the degree of formality.70 The Edwards court denied anti-retaliation protection by holding that an “inquiry” is defined as a “request for information,” but based on the facts before the court, the employer did not request the information the plaintiff provided.71

Circuits that have extended anti-retaliation protection to individuals who file internal complaints have examined the statutory language of Section 510 with a passing glance.72 More recent arguments for a broad

68 Edwards, 610 F.3d at 222 (exploring whether plaintiff complained in “inquiry or proceeding”).
69 King, 337 F.3d at 427 (finding language of Section 510, read together, leads to degree of formality). The court stated that “the use of the phrase ‘testified or is about to testify’ does suggest that the phrase ‘inquiries or proceedings’ referenced in section 510 is limited to the legal or administrative, or at least to something more formal than written or oral complaints made to a supervisor.” Id.
70 Nicolaou, 402 F.3d at 330 (considering what constitutes an inquiry). The court stated that the “proper focus is not on the formality or informality of the circumstances under which an individual gives information, but rather on whether the circumstances can fairly be deemed to constitute an ‘inquiry.’” Id. The court further stated that the proper analysis of the meaning of the terms “inquiry” and “proceeding” was done independently, and those terms were not considered in light of other statutory terms present in Section 510, such as language that referenced “testimony.” Id. at 330 n.3. The court highlighted the congressional determination to include both the term “inquiry” and “proceeding” in Section 510, as opposed to the congressional determination to include only the term “proceeding” in the language of FLSA Section 15(a)(3), as the intention of Congress to give these terms “their separate, normal meanings.” Id. at 329 (citing Garcia v. United States, 469 U.S. 70, 73 (1984)).
71 Edwards, 610 F.3d at 223 (basing denial of plaintiff’s claim on circumstances and not degree of formality). The court rejected the plaintiff’s contention that assertions made to management were the inquiry themselves, reasoning that the plaintiff did not provide evidence that anyone approached her for information, but rather that she willfully provided information that was not requested. Id. The court further found that the plaintiff’s complaints were statements and not questions, and that Section 510 provides protection to employees who “give[] information” and not to employees who receive information. Id. The court concluded that the scope of the statutory term inquiry covers “inquiries made of an employee, not inquiries made by an employee.” Id.
72 See Hashimoto v. Bank of Haw., 999 F.2d 408, 411 (9th Cir. 1993) (concluding ERISA Section 510 “clearly meant to protect whistleblowers”). The court asserted that the statute “may be fairly construed to protect a person in [the plaintiff's] position if, in fact, she was fired because she was protesting a violation of law in connection with an ERISA plan.” Id.; see also Anderson v. Elec. Data Sys. Corp., 11 F.3d 1311, 1315 (5th Cir. 1994) (classifying Section 510 as broad
interpretation of Section 510 are based on the notion that ERISA is a remedial statute. However, the Third Circuit in Edwards rejected the argument for a broad interpretation of Section 510 based on ERISA’s status as a remedial statute because it found that Section 510 was unambiguous.

D. ERISA Preemption of State Law Claims

Circuits that deny Section 510’s anti-retaliation protection to employees who complain internally are likely to leave such employees without any recourse, particularly if that circuit also rules that ERISA preempts state law anti-retaliation claims. Plaintiffs in this particular context are likely left without a cause of action because Section 514(a) of ERISA expressly preempts any state law claims that are related to an employee benefit plan governed by ERISA. The United States Supreme Court has not yet decided whether a state law cause of action against an employer—as a result of discipline or discharge for making a complaint regarding alleged ERISA wrongdoing—is preempted by Section 514(a); however, the Court has decided a similar issue in favor of preemption of a prohibition against adverse employment action for providing ERISA related information).

73 See Edwards, 610 F.3d at 223 (addressing plaintiff’s argument for broad statutory reading). The plaintiff and the amicus curiae argued that because ERISA is a “remedial statute,” Section 510 should be “liberally construed in favor of protecting the participants in employee benefits plans.” Id. (citing IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc., 788 F.2d 118, 127 (3d Cir. 1986)). However, the court rejected this argument based on its determination that the statutory language was clear and unambiguous. Id. at 223-24 (citing Wolk v. Unum Life Ins. of Am., 186 F.3d 352, 355 (3d Cir. 1999)).

74 Edwards, 610 F.3d at 223-24 (rejecting plaintiff’s argument for broad reading stating statute was clear and unambiguous). The court concluded that where there is a clear statutory provision, the analysis does not need to delve into congressional intent. Id. at 224. The court reasoned that if Congress was concerned that Section 510 would lead to a lack of protection for internal employee complainants, it could have implemented more expansive language similar to the protection provided by Title VII. Id.

75 See Barclay-Strobel, supra note 36, at 541-42 (describing how ERISA preemption of state retaliation claims lead to a lack of remedy). See generally Anguiera & Conforto, supra note 18, at 956-57 (concluding ERISA preemption of state claims for wrongful discharge leaves plaintiffs without a remedy).

76 29 U.S.C. § 1144 (2006) (promulgating ERISA’s express preemption provision). Section 514(a) reads:

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

Id.
state law cause of action, claiming that an employee was wrongfully
terminated to prevent the attainment of entitled benefits under an ERISA
plan. In that case, the Court concluded that the plaintiff’s claim, which
alleged that the employer illegally discharged the plaintiff to prevent the
collection of pension benefits, was related to an ERISA-regulated plan
within the meaning of Section 514(a), and, thus, was subject to
preemption. The Court reasoned that a law is related to an ERISA plan if
it correlates to, or references the benefit plan, and that Section 514(a)’s
broad language preempts state law even when the state law does not have a
direct affect on an ERISA plan. The Court noted that the mere enactment
of a federal regulatory statute, even if fairly comprehensive, does not
mandate state law preemption. Rather, the Court stressed the need for
“special features” warranting pre-emption” in order to find that a federal
regulatory scheme preempts state law. The Court further explained that

Court). “This case presents the question whether [ERISA] ... pre-empts a state common law
claim that an employee was unlawfully discharged to prevent his attainment of benefits under a
plan covered by ERISA.” Id.
78 Id. at 140 (setting forth holding of the court). “[W]hen it is clear or may fairly be
assumed that the activities which a State purports to regulate are protected’ by § 510 of ERISA,
due regard for the federal enactment requires that state jurisdiction must yield.” Id. at 145
Congress intended to restrict ERISA’s pre-emptive effect to state laws purporting to regulate plan
terms and conditions, it surely would not have done so by placing the restriction in an adjunct
definition section while using the broad phrase ‘relate to’ in the pre-emption section itself.” Id. at
141. The Court established that ERISA preemption is applicable to a state law cause of action
that clashes with ERISA or sets forth an additional enforcement instrument. N.Y. State
(1995). But see Barclay-Strobel, supra note 36, at 541 (“Some scholars and district courts
contend that state law wrongful discharge claims arising from complaints of ERISA violations are
too tenuously related to ERISA to be preempted.”).
79 See McClendon, 498 U.S. at 139 (reasoning ERISA’s broad preemption provision
preempts laws that do not directly affect ERISA plans). “The key to § 514(a) is found in the
words ‘relate to.’ Congress used these words in the broad sense, rejecting more limited pre-
emption language that would have made the clause ‘applicable only to state laws relating to the
specific subjects covered by ERISA.’” Id. at 138 (quoting Shaw v. Delta Air Lines, Inc., 463
U.S. 85, 98 (1983)). The Court also highlighted Congress’s intent for Section 514(a) to serve as a
broad mandate applicable to “all laws, decisions, rules, regulations, or other State action
having the effect of law.” Id. at 139 (quoting 29 U.S.C. § 1144(c)(1) (2006)); see also Pilot Life Ins.
Co. v. Dedeaux, 481 U.S. 41, 46 (1987) (asserting Congress made Section 514 expansive to “establish
pension plan regulation as exclusively a federal concern” (quoting Alessi v. Raybestos-
Manhattan, Inc., 451 U.S. 504, 523 (1981))).
80 See McClendon, 498 U.S. at 143 (emphasizing more than just existence of federal statute
necessary for preemption).
81 Id. (finding Section 502(a)’s civil enforcement provision constitutes “special feature
warranting preemption); see also Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987) (“The
policy choices reflected in the inclusion of certain remedies and the exclusion of others under the
federal scheme would be completely undermined if ERISA-plan participants and beneficiaries
Section 514(a) preempted the state law in question because Congress intended ERISA to guarantee that employee benefits plans across state jurisdictions would be regulated pursuant to a consistent set of laws pertaining to employee benefits. This emphasis on consistency is particularly warranted with anti-retaliation provisions, which vary across state jurisdictions due to state public policy concerns.

E. ERISA Circuit Split Concerning Preemption of State Law Retaliation Claims

In addition to the circuit split concerning conduct that triggers Section 510’s anti-retaliation protection, there is an interrelated circuit split pertaining to whether ERISA preempts state wrongful discharge claims brought by employees who have filed internal complaints to the employer alleging a violation of ERISA. The circuit courts of appeals that have ruled in favor of preemption of state law claims for retaliatory discharge were free to obtain remedies under state law that Congress rejected in ERISA.”); Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985) (“The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.”).

McClendon, 498 U.S. at 142. The Court highlighted the congressional intent in enacting Section 514(a) to avoid inconsistencies that could lead to “inefficiencies . . . to the detriment of plan beneficiaries.” Id. “Particularly disruptive is the potential for conflict in substantive law. It is foreseeable that state courts, exercising their common law powers, might develop different substantive standards applicable to the same employer conduct, requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.” Id.

Compare Conscientious Employee Protection Act, N.J. STAT. ANN. § 34:19-3 (West 2011) (providing expansive anti-retaliation protection to employees), with TEX. GOV’T CODE ANN. § 554.002 (West 2004) (providing whistleblower protection only to public employees), Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985) (recognizing public policy exception to at-will employment only when employee refuses to perform unlawful conduct), and Barclay-Strobel, supra note 36, at 524-25 (illuminating lack of state law claim for internal complainants in Texas). The New Jersey legislature decided to codify the state’s public policy exception to the at-will employment doctrine by providing protection from employer retaliation to an employee who:

Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer, or another employer, with whom there is a business relationship, that the employee reasonably believes . . . is in violation of a law, or a rule or regulation promulgated pursuant to law

§ 34:19-3.

See Edwards v. A.H. Cornell & Son, Inc., 610 F.3d 217, 220-21 (3d Cir. 2010) (discussing different outcomes regarding preemption among federal circuit courts of appeals); see also Anguiera & Conforto, supra note 18, at 974-75 (outlining circuits that have ruled for and against preemption of state law retaliation claims).
have based each ruling on the decision set forth in *McClendon*.\(^85\) In *Hashimoto*, the Ninth Circuit concluded that ERISA preempted the plaintiff’s state law cause of action for wrongful termination because resolution of the state law claim would have demanded resolution of issues related to ERISA.\(^86\) Likewise, in *Anderson*, the court concluded that ERISA preempted the plaintiff’s retaliatory termination claim because the plaintiff based the claim on his objections to the alleged ERISA violations and his complaint to the employer.\(^87\) Conversely, in *King*, the United States Court of Appeals for the Fifth Circuit ruled that the plaintiff’s state law retaliatory termination cause of action was not completely preempted.\(^88\)

**F. Lesson Learned—The Implications and Public Policy Considerations of Sarbanes-Oxley on ERISA**

One federal statute recently enacted in response to widespread corporate malfeasance, and which could have far reaching implications on ERISA, is the Sarbanes-Oxley Act.\(^89\) At least two scholars have drawn a parallel between corporate governance and investment issues, and issues pertaining to employee pensions.\(^90\) One specific correlation, which led to the enactment of Sarbanes-Oxley, is the “lack of transparency and accountability” that pertains to ERISA and the regulations preceding

\(^85\) See *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311, 1313 (5th Cir. 1994) (asserting *McClendon* is guiding decision); see also *Hashimoto v. Bank of Haw.*, 999 F.2d 408, 412 (9th Cir. 1993) (finding preemption because state claim related to ERISA).

\(^86\) *Hashimoto*, 999 F.2d at 411 (holding state law retaliatory discharge claim related to ERISA). The court noted that the “breadth of ERISA preemption is considerable.” *Id.* at 410. The court reasoned that preemption was applicable to the state law claim because a decision on the claim would entail interpretation of ERISA, and that ERISA itself provided the plaintiff with a remedy under Section 510. *Id.* at 410-11

\(^87\) *Anderson*, 11 F.3d at 1314 (asserting state law claim is related to ERISA plan). The court elucidated that the plaintiff’s “claim falls squarely within the ambit of ERISA.” *Id.* (quoting *McClendon*, 498 U.S. at 142). The court also noted that enforcement of the state law cause of action for retaliatory discharge would conflict with sections 502(a) and 510 of ERISA. *Id.*


\(^90\) See Justin Cummins & Meg Luger Nikolai, *ERISA Reform in a Post-Enron World*, 39 J. Marshall L. Rev. 563, 564 (2006) (comparing corporate governance issues with ERISA issues). “In particular, the accounting scandals of the 1990s as well as the savings-and-loan disaster of the 1980s bear a striking resemblance to the corporate misdeeds underlying the unfolding pension crisis.” *Id.* “Just as the lack of transparency and accountability in the accounting context encouraged the malfeasance that prompted economic setbacks and even bankruptcy, so too has the obfuscation and evasion afflicting pension practices undermined pension security and even caused outright default.” *Id.* at 592.
Intensifying the lack of clarity for pensioners is the degree of complexity in ERISA’s mandates. The reality is that employees are most often devoid of sufficient knowledge or understanding of their rights and their employer’s duties under ERISA. Exacerbating that lack of transparency and accountability is an ERISA provision allowing employers to serve as the ERISA plan administrator, which ultimately leads to the potential for a conflict of interest on the part of the employer.

Some scholars fear that inaction on the part of both Congress and the courts to remedy issues regarding employee pensions could have a worse impact on the national economy than the instances of corporate malfeasance. The basis for this public policy concern—similar to the issues that first led to the enactment of Sarbanes-Oxley—is the importance of pension benefit plans to the public at-large, because it pertains to millions of American employees. Although employees often do not have

---

91 See id. at 564 (“[T]he lack of transparency and accountability that drove the corporate-governance and savings-and-loan scandals also underlies the emerging pension debacle.”).

92 See id. at 597 (“Although ERISA purports to mandate clarity of pension rights and plan obligations, the reality is often unfortunately different.”); see also Ann C. Bertino, Comment, The Need for a Mandatory Award of Attorney’s Fees for Prevailing Plaintiffs in ERISA Benefits Cases, 41 CATH. U. L. REV. 871, 904 n.253 (1992) (highlighting ERISA’s complexity). “ERISA is so complex that many attorneys hesitate to learn the statute. It is unrealistic to expect that the average lay person could enforce his or her rights under ERISA without assistance.” Bertino, supra, at 904 n.253.

93 See Cummins & Nikolai, supra note 90, at 590 (highlighting employees’ limited ERISA knowledge). “[O]rdinary employees with a stake in a pension plan do not necessarily have the technical knowledge to fully understand the legal requirements and the consequences of various corporate actions.” Id. See generally Colleen E. Medill, The Individual Responsibility Model of Retirement Plans Today: Conforming ERISA Policy to Reality, 49 EMORY L.J. 1, 63-73 (2000).

94 See 29 U.S.C. §1108(c)(3) (2006) (permitting employer administered benefit funds); Cummins & Nikolai, supra note 90, at 589-90 (recognizing employer-administered benefit plans have potential for conflict of interest). “Indeed, the statutory scheme - by its express terms and how it has been subsequently interpreted by federal courts - invites the opportunistic behavior that eventually took down the likes of Enron and Andersen.” Id. at 590.

95 See Cummins & Nikolai, supra note 90, at 564 (noting Congress and courts have recognized crucial role pensions play in national economy). “[T]he fundamental shortcomings of the ERISA statutory scheme make it unlikely that the pension system can be saved from eventual ruin without the implementation of radical reforms.” Id. at 591.

96 See 29 U.S.C. § 1001(a) (2006) (recognizing importance of benefit plans for American employees). ERISA asserts the congressional finding that “the continued well-being and security of millions of employees and their dependents are directly affected by these [employee benefits] plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations . . . .” Id.; see also Cummins & Nikolai, supra note 90, at 564 (“[P]ensions play a pivotal role in securing the economic and social well-being of tens of millions of retirees and their families.”). “Given the magnitude of the assets involved and the millions of families affected by the fate of the United States’ pension system, the stakes are high.” Id. at 567; see also Jane D. Bailey, Tenth
the knowledge or understanding sufficient to remedy ERISA violations, two scholars have argued that employees are in the best position to discover and report alleged improprieties perpetrated by the employer, and, thus, should be granted broader protection by Congress, similar to the anti-retaliation protections promulgated in Sarbanes-Oxley.97

G. Implications of the Supreme Court’s FLSA Decision in Kasten v. Saint-Gobain Performance Plastics Corp. on the Potential Resolution of the ERISA Circuit Split

The most recent Supreme Court decision to consider the scope of a federal anti-retaliation provision was Kasten v. Saint-Gobain Performance Plastics Corp.,98 which analyzed the scope of employee protection pursuant to the FLSA.99 The Court in Kasten specifically addressed whether the statutory language “filed any complaint,” as found in Section 215(a)(3) of the FLSA, included an employee’s verbal complaints.100 In Kasten, the plaintiff asserted that he complained verbally to his employer about time-clocks located in an area that prevented employees from receiving compensation for all hours worked; also, he alleged that his employer terminated his employment as a result of this internal verbal complaint.101

The district court granted summary judgment for the employer based on the rationale that the FLSA did not provide anti-retaliation

97 See Cummins & Nikolai, supra note 90, at 599-600 ("As Congress recognized in enacting Sarbanes-Oxley, employees are often the best situated to learn about and report evident illegalities by companies."). Currently, neither ERISA, nor state law protect employees from retaliation for internal reporting of alleged ERISA violations because ERISA fails to provide a remedy, and state anti-retaliation claims are preempted. Id. at 599.
99 Id. at 1329 (considering what employee action triggers anti-retaliation protection under FLSA).
100 Id. at 1330 (setting forth anti-retaliation protection provided under FLSA). The statute does not allow employers “to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to [the Act], or has testified or is about to testify in such proceeding, or has served or is about to serve on an industry committee.” Id. at 1329 (alteration in original) (quoting § 215(a)(3)).
101 Kasten, 131 S. Ct. at 1329-30 (setting forth employee’s cause of action for retaliation). Kasten alleged that he complained verbally about the placement of the time-clocks to his supervisor, his lead operator, the manager of human resources, and the manager of operations. Id. Kasten also claimed that these verbal, internal complaints to company officials led to his discipline and termination. Id. at 1330.
protection to employees for oral complaints. The United States Court of Appeals for the Seventh Circuit affirmed the district court’s ruling, agreeing that oral complaints did not trigger FLSA protection from employer retaliation. The Supreme Court granted certiorari to address the scope of anti-retaliation protection under the FLSA and, more narrowly, to determine whether courts should provide protection from retaliation to employees who make oral complaints.

To interpret the statutory phrase “filed any complaint” in the FLSA’s anti-retaliation provision, the Court considered the statute’s context and purpose. This manner of interpretation led the Court to conclude that oral complaints by employees may trigger the FLSA anti-retaliation provision. However, the Court limited its decision to the narrow issue of whether oral complaints trigger statutory anti-retaliation protection, and expressly refused to address whether internal complaints trigger the anti-retaliation protection or whether an employee was required to file a complaint with a government agency or initiate a court proceeding. The Court reasoned that consideration and resolution of the issue as to whether internal employer complaints were covered by the FLSA, or whether the employee was required to file with the government, was not “predicate to an intelligent resolution” of the issue of whether oral complaints triggered the statute’s protection.

---

102 Kasten v. Saint-Gobain Performance Plastics Corp., 619 F. Supp. 2d 608, 613 (W.D. Wis. 2008), aff’d 570 F.3d 834 (7th Cir. 2009), vacated and remanded 131 S. Ct. 1325 (2011) (holding plaintiff’s oral complaint not protected under FLSA).


104 Kasten, 131 S. Ct. at 1330 (granting certiorari for purpose of resolving circuit split).

105 Id. ("[I]nterpretation . . . depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." (quoting Dolan v. U.S. Postal Serv., 546 U.S. 481, 486 (2006))).

106 Id. at 1336 (holding oral complaints protected by the FLSA). The Court noted that “legislators, administrators, and judges have all sometimes used the word ‘file’ in conjunction with oral statements.” Id. at 1331. The Court recognized that other federally enacted regulations have also permitted the filing of oral complaints. Id. at 1331-32. The Court also noted judicial decisions contemporaneous with the enactment of the FLSA to conclude that oral filings of complaints were allowed at the time by judges across various jurisdictions and contexts. Id. at 1332. Finally, the Court’s analysis culminated in a review of the statutory purpose and objectives—the protection of employees’ minimum working conditions, and the reliance of employee assistance in achieving that goal—as the basis for holding that oral complaints deserve protection from retaliation. Id. at 1333.

107 Id. at 1336 (refusing to consider internal/external issue of complaint filing). The Court did not consider the issue of who the complaint must be filed with because Saint-Gobain failed to raise the issue in its response brief to Kasten’s certiorari petition. Id.

108 Id. (basing deferral of Saint-Gobain’s claim on premise that oral complaints issue could
However, in dissent, Justice Scalia, joined by Justice Thomas, asserted that they would affirm the holding of the Seventh Circuit because internal employee complaints to the employer do not trigger FLSA Section 215(a)(3) protection. Justice Scalia disagreed with the majority’s decision to ignore the issue of to whom the complaints need to be filed for the employee to obtain statutory protection. Rather, Justice Scalia stated that the phrase “filed any complaint” requires a formal filing with an agency or court. In concluding that the statutory language of the FLSA anti-retaliation provision was clear and unambiguous, Justice Scalia asserted that it was not necessary to consider congressional intent. Despite the statute’s clarity, Justice Scalia, nonetheless, analyzed the congressional intent and assumed that Congress may have refused to provide anti-retaliation protection to internal employee complaints because of a desire to limit employers’ liability. Justice Scalia further recognized that Congress could have provided broader protection to FLSA internal employee complaints by crafting the anti-retaliation provision with language similar to the protection provided in Title VII.
IV. ANALYSIS

A. Plain Meaning of Section 510 Does Not Cover Unsolicited Employee Reporting of ERISA Wrongdoing

The main rationale behind the federal circuit courts of appeals decisions to deny anti-retaliation protection to employees who only report alleged violations of ERISA internally to the employer is that the plain meaning of ERISA’s anti-retaliation provision found in Section 510 does not protect such employee action.115 Although the Second, Third, and Fourth Circuit Courts of Appeals agree that employees who make unsolicited, internal complaints should not receive anti-retaliation protection, these courts are split over whether employees who participate in solicited, internal inquiries should receive protection from retaliation.116 For example, in King, the Fourth Circuit refused to extend anti-retaliation protection to an employee who reported alleged violations internally to the employer because the employee did not participate in a formal inquiry or proceeding within the plain meaning of Section 510’s mandate.117 However, in Nicolaou, the Second Circuit focused on whether the employee’s internal reporting was made in furtherance of an “inquiry”—rather than the degree of formality of the inquiry—and determined that solicited, internal complaints may warrant anti-retaliation protection while unsolicited, internal complaints made to the employer do not trigger statutory protection from retaliation pursuant to Section 510.118 Likewise,


116 Compare Edwards, 610 F.3d at 223 (leaving open question of whether solicited internal complaints warrant anti-retaliation protection per Section 510), and Nicolaou, 402 F.3d at 328-29 (stating solicited internal complaints would warrant protection from retaliation pursuant to Section 510), with King, 337 F.3d at 427 (holding phrase inquiry or proceeding limits protection to information given in formal proceeding).

117 See supra note 55 and accompanying text (describing Fourth Circuit’s reliance on requisite formality of “inquiry or proceeding”). The court reasoned that including the language “testified or about to testify,” in the text of Section 510 implies that the phrase “inquiry or proceeding” requires employees to participate in a formal legal or administrative process in order to obtain anti-retaliation protection. King, 337 F.3d at 427.

118 See supra notes 60-61 and accompanying text (focusing on definition of term “inquiry” and not degree of formality of inquiry).
in Edwards, the Third Circuit focused on whether the plaintiff’s conduct fell within the definition of “inquiry,” and held that the employee’s unsolicited, internal complaint did not qualify for protection from retaliation because the statutory language referred to inquiries conducted by the employer and not by the employee.\(^\text{119}\)

The line of reasoning established by the Second and Third Circuit in Nicolaou and Edwards, respectively, is proper in light of Supreme Court precedent regarding statutory interpretation because the plain language of Section 510’s text is clear and unambiguous.\(^\text{120}\) In Nicolaou, the Second Circuit properly focused on the definitions of the terms “inquiry” and “proceeding” to determine whether the employee’s conduct included participation in a proceeding or inquiry.\(^\text{121}\) In Edwards, the Fourth Circuit also determined that the text of Section 510 was clear and unambiguous, found no need to look to the statute’s congressional intent, and held that the employee did not take part in an “inquiry” because her complaint was not in response to a request for information from the employer.\(^\text{122}\) Unlike the holding in King, which forecloses protection to employees who complain internally to the employer in response to a request for information, the Nicolaou and Edwards decisions provide protection to employees who provide information that is solicited from the employer and deny protection to employees who only provide information that is not solicited.\(^\text{123}\)

Not only are the decisions in Nicolaou and Edwards appropriate because they extend protection based on the plain meaning of Section 510 to internal, solicited complaints from employees who are asked to participate in an employer-led investigation, but these decisions also provide protection to individuals who blow the whistle on their employer by reporting wrongdoing to the government, or by participating in a formal court proceeding.\(^\text{124}\) By extending anti-retaliation protection to internal,

---

119 See supra notes 65-66 and accompanying text (asserting Section 510 protects employees who provide information, not those who receive it).


121 See supra note 70 and accompanying text (focusing on when situation could be considered inquiry not on degree of formality).

122 See supra note 71 and accompanying text (reasoning provision protects questioned employees who provide information not employees who question and receive information).

123 See supra note 116 and accompanying text (comparing decisions of Second, Third, and Fourth Circuits regarding protection afforded to internal complainants).

solicited complaints while denying protection to unsolicited, internal complaints, these decisions have a practical impact on employees to encourage reporting of alleged ERISA wrongdoing to the government or an attorney, both of which are in a better position to see that any improprieties are remedied.125

On the other hand, the Ninth Circuit in Hashimoto appears to concede that providing protection to employees who file unsolicited, internal complaints effectively provides whistleblower protection to the employees “before the whistle is blown.”126 Hashimoto and the analogous decision in Anderson relied on a cursory analysis of the statutory language in Section 510 to evaluate the facts of each case.127 Such a superficial analysis likely led each court to conclude that all internal complaints trigger the protection of Section 510; a conclusion which seems to be based on a pragmatic idealism for expansive protection of employee internal complaints and which is not supported by the explicit language of Section 510.128

B. Section 510 in Light of Anti-Retaliation Provisions in Other Statutes

Related to the rationale discerned by the Second, Third, and Fourth Circuits when implementing the plain meaning interpretation of Section

anti-retaliation protection for external complaints or solicited internal complaints pursuant to Section 510); Nicolaou v. Horizon Media, Inc., 402 F.3d 325, 328-29 (2d Cir. 2005) (holding external or solicited internal complaints warrant protection from retaliation pursuant to Section 510).

125 See supra notes 92-93, 97 and accompanying text (arguing public policy demands that protection be afforded to employees who report ERISA wrongdoing externally). Denying protection to internal complainants encourages employees to actually blow the whistle rather than rely on self-help remedies between employee and employer. See supra notes 92-93, 97 and accompanying text.

126 See Hashimoto v. Bank of Haw., 999 F.2d 408, 411 (9th Cir. 1993) (finding ERISA Section 510 protects internal complaints of ERISA violation made to employer).

The normal first step in giving information or testifying in any way that might tempt an employer to discharge one would be to present the problem first to the responsible managers of the ERISA plan. If one is then discharged for raising the problem, the process of giving information or testifying is interrupted at its start: the anticipatory discharge discourages the whistle blower before the whistle is blown.

Id. (emphasis added).

127 See supra note 72 and accompanying text (explaining the Fifth and Ninth Circuits’ cursory reviews of Section 510’s language).

128 See supra notes 73-74 and accompanying text (discussing Edwards decision to deny expansive anti-retaliation protection based on statute’s plain meaning).
510 is the notion that Congress could have provided for more expansive anti-retaliation protection.\textsuperscript{129} Ten years prior to the enactment of ERISA, Congress established Title VII of the Civil Rights Act of 1964, which provided protection to employees from employer discrimination.\textsuperscript{130} Within Title VII, Congress created an anti-retaliation provision that protects employees who “opposed any practice” of the employer that is discriminatory.\textsuperscript{131} In creating Section 704 of Title VII, Congress granted employees broad protection from retaliation for an employee’s internal communications with the employer.\textsuperscript{132}

In contrast, Section 510 of ERISA does not provide as broad an anti-retaliation protection to employees as the protection found in Section 704 of Title VII, based on an interpretation of the plain meaning of each statute.\textsuperscript{133} Instead of providing protection to employees who “opposed any practice deemed unlawful,” Congress chose in Section 510 of ERISA to protect only those employees who divulged information in an “inquiry or proceeding.”\textsuperscript{134} When Congress enacted ERISA in 1974, it had Section 704 of Title VII as a template, but instead chose not to extend similar expansive protection from retaliation to employees who reported ERISA

\textsuperscript{129} See Edwards, 610 F.3d at 224 (reasoning Congress could have provided similar protection to ERISA and Title VII complainants). The court explained that Title VII’s Section 704 provides broader protection from retaliation than ERISA Section 510. \textit{Id.} at 223. The court asserted that Congress could have expanded the protection afforded by Section 510 if it included broader anti-retaliation language comparable to Title VII. \textit{Id.}; King v. Marriott Int’l, Inc., 337 F.3d 421, 427 (4th Cir. 2003) (reasoning Section 510 anti-retaliation protection is narrower in scope than Section 704 of Title VII).


\textsuperscript{131} 42 U.S.C. § 2000e-3(a) (2006). The language of the Title VII anti-retaliation provision captured in Section 704 reads as follows:

\begin{quote}
It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made unlawful by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.
\end{quote}

\textit{Id.}

\textsuperscript{132} See King, 337 F.3d at 427 (noting broad anti-retaliation protection afforded pursuant to Section 704 of Title VII).

\textsuperscript{133} See Edwards, 610 F.3d at 223 (finding ERISA Section 510 provides more limited anti-retaliation protection than Title VII Section 704). The court asserted that Congress could have expanded the protection afforded by Section 510 if it included broader anti-retaliation language comparable to Title VII. \textit{Id.}

wrongdoing internally to the employer only.135

C. Calling on Congress: Statutory Amendments and Solutions

In the absence of a Supreme Court holding in favor of protecting employees who make unsolicited reports of alleged ERISA violations internally, Congress is the proper forum for expanding the scope of Section 510 anti-retaliation protection by means of statutory amendment.136 If Congress were to choose to craft a more encompassing anti-retaliation provision in ERISA, it would not need to reinvent the wheel, but rather could look to various statutory provisions that protect employee-whistleblowers.137 First, Congress could draw guidance from Section 704 of Title VII to protect individuals who would oppose any employment practice that violates ERISA.138 Second, Congress could look to the anti-retaliation provision found in Sarbanes-Oxley, which explicitly protects employees from employer retaliation for reporting various securities violations internally.139

Additionally, Congress could seek direction from various codified anti-retaliation provisions at the state level. For example, the New Jersey Conscientious Employee Protection Act explicitly protects employees from employer retaliation for internally or externally reporting a company’s illegal acts.140 Amending ERISA Section 510 to reflect certain provisions of Sarbanes-Oxley, Title VII, or New Jersey’s Conscientious Employee Protection Act would likely protect against retaliation those employees who make internal complaints, and such a revision might also assist in providing plan fiduciaries, such as human resources directors or comptrollers, with a method of refusing to take any action on behalf of the company that violates ERISA, short of filing an internal or external complaint.141

135 See Edwards, 610 F.3d at 224 (stating Congress chose not to provide broader protection for ERISA whistleblowers).
136 See Cummins & Nikolai, supra note 90, at 599 (arguing Congress should enact more expansive ERISA anti-retaliation protection for employees).
139 See Cummins & Nikolai, supra note 90, at 599-600 (explaining Sarbanes-Oxley protects employee internal complaints of securities violations).
141 See Edwards v. A.H. Cornell & Son, Inc., 610 F.3d 217, 224 (3d Cir. 2010) (reasoning Congress could have provided broader protection for employee internal complaints similar to
D. Practical and Public Policy Considerations of Section 510’s Language

When considering various aspects of public policy, ERISA reform regarding the anti-retaliation protection afforded to employees is ripe. Particularly insightful are the lessons learned from the corporate crises that led to the enactment of Sarbanes-Oxley—a statute that includes a broad reaching anti-retaliation provision for internal employee complaints. The parallels between the corporate meltdowns and the potential benefit fund predicament dictate that sufficient public policy considerations exist to warrant Congress’s reconsideration of amending ERISA to increase protection for whistleblowers. Furthermore, the immense number of individuals and families who rely on ERISA benefit plans for their economic well-being, as well as the implications that benefit funds have on the national economy, only intensifies the public policy considerations of ensuring proper ERISA benefit fund administration.

The current status of anti-retaliation protection across the federal circuits is in conflict, and the circuit split ultimately contradicts an essential purpose behind the enactment of ERISA—to provide uniformity in the administration of employee benefit funds across state jurisdictions. The recent trend in federal circuit courts of appeals decisions, however, limits employee protection from retaliation for internal complaints regarding ERISA wrongdoing on the part of the employer. Such decisions base

Title VII; Cummins & Nikolai, supra note 90, at 599-600 (“As Congress recognized in enacting Sarbanes-Oxley, employees are often the best situated to learn about and report evident illegalities by companies.”). See supra note 90 and accompanying text (analogizing corporate crises of 1990s with concerns surrounding ERISA). See supra note 97 and accompanying text (noting congressional recognition of value of employee complaints that led to broad protection under Sarbanes-Oxley). See 29 U.S.C. § 1108(c)(3) (2006) (permitting employer administered benefit funds); Cummins & Nikolai, supra note 90, at 589-90 (recognizing employer-administered benefit plans have potential for conflict of interest). “Indeed, the statutory scheme—by its express terms and how it has been subsequently interpreted by federal courts—invites the opportunistic behavior that eventually took down the likes of Enron and Andersen.” Cummins & Nikolai, supra note 90, at 590. See supra notes 95-96 and accompanying text (expressing important individual and national economic considerations associated with employee benefit funds). See Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 11 (1987) (highlighting purpose of ERISA’s enactment); supra note 36 and accompanying text. See, e.g., Edwards v. A.H. Cornell & Son, Inc., 610 F.3d 217, 223 (3d Cir. 2010) (holding Section 510 does not protect unsolicited internal complaints based on plain reading of statute); Nicolaou v. Horizon Media, Inc., 402 F.3d 325, 328-29 (2d Cir. 2005) (holding unsolicited internal complaints do not constitute inquiry or proceeding); King v. Marriott Int’l, Inc., 337 F.3d 421, 428 (4th Cir. 2003) (concluding “inquiry or proceeding” suggests a limit to protection for information given in a formal proceeding).
their holdings in sound reasoning that the statutory text is plain and unambiguous, only providing anti-retaliation protection to employees who report ERISA violations externally.\textsuperscript{148}

Not only do these decisions comport with the plain meaning of the statutory language, but they also send an appropriate and important message to employees that in order to guarantee anti-retaliation protection, the employee must initiate an external complaint with either the government or a plaintiff’s attorney.\textsuperscript{149} The practical implications of these decisions are intuitive of the public policy surrounding the administration of employee benefit plans.\textsuperscript{150} The ERISA promulgated rules are complex, however, employees are often situated in the best position to monitor the plans to ensure compliance.\textsuperscript{151} By protecting only those employees who report violations externally, these judicial decisions encourage employees to report allegations of wrongdoing to the government or plaintiff’s attorneys, both of whom are better equipped with the necessary knowledge and ability to remedy any impropriety; thus, reliance on the employer to remedy employer-created violations is avoided in instances where alleged violations are reported externally by an employee of the company.\textsuperscript{152}

E. Realism or Idealism? The Potential Impact of the Supreme Court’s Decision in Kasten v. Saint-Gobain Performance Plastics Corp. on the Outcome of the ERISA Circuit Split

The Supreme Court’s decision in Kasten has arguably aggravated the divide among the federal circuits when it comes to interpreting the

\begin{footnotesize}
\begin{enumerate}
\item[148] See supra note 147 and accompanying text (stating holdings of recent circuit cases).
\item[149] See Cummins & Nikolai, supra note 90, at 590 (“As Congress recognized in enacting Sarbanes-Oxley, employees are often the best situated to learn about and report evident illegalities by companies”); id. at 599-600 (highlighting limited ERISA knowledge of employees and need to report violations to plaintiff’s attorneys).
\item[150] See 29 U.S.C. § 1108(c)(3) (2006) (permitting employer administered benefit funds); Cummins & Nikolai, supra note 90, at 590-90 (recognizing employer-administered benefit plans have potential for conflict of interest). “Indeed, the statutory scheme—by its express terms and how it has been subsequently interpreted by federal courts—invites the opportunistic behavior that eventually took down the likes of Enron and Andersen.” Cummins & Nikolai, supra note 90, at 590; see also supra note 96 and accompanying text (discussing importance of pensions).
\item[151] See Bertino, supra note 92, at 904 n.253 (highlighting ERISA’s complexity). “ERISA is so complex that many attorneys hesitate to learn the statute. It is unrealistic to expect that the average lay person could enforce his or her rights under ERISA without assistance.” Id.; see also Cummins & Nikolai, supra note 90, at 599 (highlighting congressional recognition that employees are often in best position to discover employer wrongdoing).
\item[152] See supra notes 92-93, 97 and accompanying text (describing difficulty of ERISA enforcement for average employee).
\end{enumerate}
\end{footnotesize}
scope of anti-retaliation provisions in federal statutes.\textsuperscript{153} Instead of establishing a bright-line rule pertaining to whether the anti-retaliation provision of the FLSA covers internal employee complaints made to the employer, or solely employee external complaints made to a governmental agency or as part of a pending civil suit, the Court only decided that oral, employee complaints warrant protection under the statute and declined to answer the question of to whom employees must file a complaint to obtain the statute’s anti-retaliation protection.\textsuperscript{154} The Court’s reasoning that it is not necessary to decide whether internal complaints should be protected at all under the FLSA is unsound because the issue of to whom an employee must file a complaint in order to obtain protection under the statute is outcome-determinative, similar to the ERISA anti-retaliation statute.\textsuperscript{155}

In contrast, the dissent in \textit{Kasten} provides the correct approach for interpreting statutory anti-retaliation provisions and is better reasoned than the majority opinion. Justice Scalia asserted that he would have held that the FLSA does not protect employees from retaliation who only file internal complaints to their employer, and he based his opinion on proper reasoning that the plain meaning of the statutory language requires a formal filing of the employee’s grievance with a government agency.\textsuperscript{156} Justice Scalia’s reasoning is also consistent with the reasoning of the appellate circuits that have declined to extend ERISA anti-retaliation protection to employees who only file internal complaints with their employers, based on a plain reading of the statutory text.\textsuperscript{157}

Further, analogies may be discerned between Justice Scalia’s

\textsuperscript{153} See supra note 110 and accompanying text (addressing counterintuitive nature of \textit{Kasten’s} majority opinion). “[I]t makes little sense to consider that question at all [whether oral complaints are protected by the statute] if neither oral nor written complaints to employers are protected.” \textit{Kasten v. Saint-Gobain Performance Plastics Corp.}, 131 S. Ct. 1325, 1341 (2011) (Scalia, J., dissenting).

\textsuperscript{154} See supra note 104 and accompanying text (explaining Court granted certiorari solely to decide protection afforded to oral complaints); supra note 106 and accompanying text (stating Court’s holding that oral complaints are protected pursuant to the FLSA); supra note 107 and accompanying text (declining to rule on whether internal employee complaints are protected from anti-retaliation).

\textsuperscript{155} See supra notes 107-08 and accompanying text (delineating Court’s rational for refusing to rule on with whom employee complaints must be filed). \textit{Compare Kasten}, 131 S. Ct. at 1336 (“Resolution of the Government/private employer question is not a ‘predicate to an intelligent resolution’ of the oral/written question that we granted certiorari to decide.”), \textit{with Kasten}, 131 S. Ct. at 1341 (Scalia, J., dissenting) (“[I]t makes little sense to consider [whether oral complaints are protected by the statute] at all in the present case if neither oral nor written complaints to employers are protected . . . .”).

\textsuperscript{156} See supra note 111 and accompanying text (establishing basis for Scalia’s assertion that complaints must be filed with government for protection).

\textsuperscript{157} See supra note 147 (noting circuits that have declined to extend ERISA).
dissent in *Kasten* regarding the FLSA and some of the ERISA circuits, both of which have denied broad employee anti-retaliation protection based on the premise that Congress could have provided expansive employee anti-retaliation protection for internal complaints.\(^{158}\) Even more telling on the issue of congressional intent regarding the scope of employee statutory protection from retaliation in the case of the enactment of ERISA is that Congress had the anti-retaliation provision of Title VII of the Civil Rights Act of 1964 as a template, while the FLSA was enacted prior to Title VII.\(^{159}\) This demonstrates that Congress was aware of broad language to protect employees, but instead chose to provide narrow protection from retaliation under ERISA.\(^{160}\) Regardless of the congressional reasoning for not providing employees with anti-retaliation protection for internal complaints of alleged ERISA violations made to the employer, a plain reading of the statutory language makes clear that internal complaints are not sufficient to trigger anti-retaliation protection.\(^{161}\) If Justice Scalia’s dissent in *Kasten*, and the federal appeals courts’ decisions in *Nicolaou*, *King*, and *Edwards*, are indicative of how other circuits may interpret the scope of anti-retaliation protection under ERISA, as well as how the Supreme Court may rule, plaintiff’s counsel should advise employees to “play through the whistle” and report any improprieties to the government in order to ensure protection from employer retaliation.

V. CONCLUSION

Employees who discover employer wrongdoing in the

---

\(^{158}\) *See Kasten*, 131 S. Ct. at 1337-38 (Scalia, J., dissenting) (stating Congress could have provided broader protection to employees from retaliation). Justice Scalia properly recognized that Congress could have substituted “made” any complaint for “filed any complaint” to provide more expansive employee anti-retaliation protection. *Id.*; *see also Edwards*, 610 F.3d at 224 (reasoning Congress could have provided broader protection for employee internal complaints similar to Title VII).


\(^{160}\) *See supra* notes 134-35 and accompanying text (arguing Congress could have provided broader ERISA anti-retaliation protection but chose not to).

\(^{161}\) *See Kasten*, 131 S. Ct. at 1339 (Scalia, J., dissenting) (“Congress may not have protected intracompany complaints... because it was unwilling to expose employers to the litigation, or to the inability to dismiss unsatisfactory workers, which that additional step would entail.”); *supra* notes 111, 157 and accompanying text (arguing plain reading of FLSA and ERISA warrant conclusion that internal complaints are not protected); *supra* notes 149-52 (arguing public policy and practical considerations warrant narrow employee protection to encourage government filings).
administration of an employee benefit plan will surely find themselves in an undesirable predicament. They might choose a route of inaction, thus risking harm to their benefit fund. Alternatively, they might choose to complain internally to the employer's administration, with the hope that the employer will self-correct the impropriety. However, in the latter situation, employees risk adverse employment action and even termination at the hands of a vindictive employer. Finally, employees might seek to enforce their rights and ensure the integrity of their benefit plan by seeking the assistance of the government or an attorney who can take action to remedy any employer wrongdoing.

Essentially, the safest option available, and the advice that plaintiff's attorneys should strongly consider, is that employees should report the alleged violations externally, with the hope that sufficient action will be taken to remedy any wrongdoing. If an employee chooses this course, although he or she cannot prevent employer retaliation, that employee will enjoy legal protection under ERISA Section 510. Furthermore, that employee will also increase the chance that the violations will be rectified once reviewed by competent attorneys or investigators. If the employees choose to do nothing, however, the potential for harm to both individual economic situations and the national economy is greatly increased. The recent trend of limited whistleblower protection across the federal circuits in response to a plain reading of the statute, and preemption of any meaningful state law claims, leaves employees exposed to irremediable adverse employment action if complaints are made solely to the employer.

Ultimately, Congress must take action to effect any real and meaningful change to provide employees with greater protection from retaliation for ERISA-related complaints. Sufficient public policy reasons exist for Congress to take another look and amend ERISA's whistleblower protection in light of other federal and state anti-retaliation provisions. However, until Congress acts, the federal courts should require, and attorneys should encourage, employees to “blow the whistle” by reporting alleged ERISA violations externally if they wish to enjoy protection from retaliation. Such a mandate serves to further the public policy considerations by facilitating the flow of information of alleged ERISA violations. Additionally, it also encourages those employees who are in the best position to discover and report alleged violations, to take the necessary steps to ensure their economic well-being by providing information to the government and capable private attorneys who are in the best position to rectify any wrongdoing. Such advice comports with the plain meaning of the statutory language. Until the circuit split is resolved, or Congress amends the anti-retaliation protection, employees should “play through the
whistle” and report alleged ERISA violations externally in order to obtain protection and recourse from retaliation at the hands of vindictive employers.

James Coughlin