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Reversing the Perversion: Interpreting ERISA to Protect Employees Who Report Violations of Federal Law to Their Managers

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REVERSING THE PERVERSION: INTERPRETING ERISA TO PROTECT EMPLOYEES WHO REPORT VIOLATIONS OF FEDERAL LAW TO THEIR MANAGERS

ABSTRACT

Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA) to protect workers' retirement savings from mismanagement and misuse. Section 510 of ERISA makes it unlawful for any individual to interfere with a person who attempts to enforce her rights under ERISA. Section 510 also contains an antiretaliation provision, which protects employees who report potential ERISA violations by imposing civil penalties on employers that commit an adverse employment action against an employee in retaliation for making such a report.

Courts are divided as to whether informal, unsolicited complaints to management are protected by section 510's antiretaliation provision. The courts holding that these types of complaints are within section 510's scope have largely ignored the provision's plain text and focused their analyses on congressional purpose and intent. Courts holding the opposite have focused solely on the provision's plain text, largely ignoring congressional purpose and intent. Both approaches have been incomplete and inadequate from a statutory-interpretation perspective and have created perverse incentives for both employers and employees that frustrate the overarching goal of ERISA: to provide security for workers' benefits while minimizing the administrative burden on employers.

This Comment proposes an interpretation of section 510 that is faithful both to the plain text of the statute and to congressional purpose and intent. This interpretation protects employees who make unsolicited, informal complaints to management about potential ERISA violations. It is superior to existing judicial approaches on two different levels: (1) as a matter of statutory interpretation, it best represents a synthesis of the textual method of interpretation with legislative purpose and intent; and (2) as a practical matter, it avoids perverse incentives that have frustrated the goals of ERISA.

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INTRODUCTION

Shirley Edwards was the human resources director at A.H. Cornell & Son, Inc., a family-owned business that provides commercial and residential construction services.¹ As part of her job, Edwards administered the company's employee benefit plans.² During the course of her employment, Edwards allegedly discovered several violations of the Employee Retirement Income Security Act of 1974 (ERISA).³ Edwards believed that her supervisor, Melissa Closterman, who was in charge of the day-to-day operations of the company, had implemented a scheme to save the company money at the expense of its employees by discouraging employees from participating in the company's group health insurance plan.⁴ Specifically, Edwards alleged that Closterman was intentionally overstating the amount employees would have to contribute to participate in the plan and was withholding information from the company's employees about the benefits the plan provided.⁵

Upon discovering these potential ERISA violations, Edwards claimed that she approached Closterman and Scott Cornell, one of the company's executives, and told them "she 'objected to participating in a scheme to commit criminal fraud as to Defendants' disability insurance carrier, worker's compensation insurance carrier, and health insurance carrier.'"⁶ Edwards was fired shortly after.⁷

Edwards filed suit in the United States District Court for the Eastern District of Pennsylvania for unlawful retaliation in violation of section 510 of ERISA.⁸ The district court held that section 510⁹ did not reach unsolicited, informal complaints to management concerning ERISA violations, such as the concerns Edwards expressed to Closterman and Cornell.¹⁰ On appeal, the Third

¹ *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 218 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 1604 (2011).

² *See Edwards v. A.H. Cornell & Son, Inc.*, No. 09-cv-1184, 2009 WL 2215074, at *1 (E.D. Pa. July 23, 2009), *aff'd*, 610 F.3d 217, *cert. denied*, 131 S. Ct. 1604.

³ *Id.*

⁴ *Id.*

⁵ First Amended Civil Action Complaint at 5, *Edwards*, 2009 WL 2215074 (No. 09-cv-1184).

⁶ *Edwards*, 2009 WL 2215074, at *1.

⁷ *Id.*

⁸ *Id.* at *2.

⁹ This Comment uses section 510 generally to refer only to the antiretaliation provision of section 510, *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)), unless otherwise noted.

¹⁰ *Edwards*, 2009 WL 2215074, at *4.

Circuit affirmed.¹¹ Ms. Edwards was out of a job and without a remedy under federal law.

Had Edwards lived and worked in Texas or California, however, the federal courts would have allowed her to proceed with her action under federal law.¹² The circuit courts of appeals are divided as to whether unsolicited, informal complaints to management concerning potential ERISA violations fall within the scope of section 510.¹³ In spite of this long-standing circuit split, the U.S. Supreme Court has yet to resolve the issue. The academic literature is similarly sparse in terms of analyses of the scope of section 510. Although several commentators have discussed the circuit split that is the subject of this Comment, these commentators have largely focused on describing the various methods of statutory interpretation courts have used to interpret section 510,¹⁴ or have proposed legislative solutions to broaden the scope of section 510.¹⁵

¹¹ *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 225–26 (2010), *cert. denied*, 131 S. Ct. 1604 (2011).

¹² *See infra* Part II.A.

¹³ *See infra* Part II.

¹⁴ *See, e.g.*, Malena Kinsman, Comment, *Can You Hear Me? Will the Diminishing Scope of ERISA's Anti-Retaliation Provision Drown the Cries of Whistleblowers?*, 115 PENN. ST. L. REV. 685 (2011) (summarizing the circuit split and discussing the method of statutory interpretation used by each circuit); Michael C. Ross, Comment, *Blow the Whistle at Your Own Risk: ERISA's Retaliation Provision and the Dilemma of the "Unsolicited Internal Complaint,"* 56 ST. LOUIS U. L.J. 331 (2011) (summarizing the circuit split, discussing the method of statutory interpretation used by each circuit, and analyzing the current composition of the U.S. Supreme Court to determine how it might decide the scope of section 510).

¹⁵ *See, e.g.*, Adam B. Gartner, Note, *Protecting the ERISA Whistleblower: The Reach of Section 510 of ERISA*, 80 FORDHAM L. REV. 235 (2011) (analyzing the circuit split and proposing an amendment to section 510); Erik Rome, Note, *Recognizing Those Left Unprotected by ERISA's Section 510 Loophole: Congress Must Act to Protect These Employees*, 21 KAN. J.L. & PUB. POL'Y 194 (2011) (same). One commentator has taken a different approach. *See* 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 (2010). Barclay-Strobel proposes a broad interpretation of the antiretaliation provision of the Fair Labor Standards Act (FLSA) and "argues that an expansion of FLSA will lead to a similar expansion of ERISA." *Id.* at 527. Fundamentally, Barclay-Strobel assumes that judicial interpretations of the antiretaliation provision of the FLSA will inform judicial interpretations of section 510. *See id.* ("Given that courts rely on their circuit's interpretation of FLSA's antiretaliation provision to inform the scope of ERISA's provision, a resolution of the FLSA circuit split will lead to the same result under ERISA."). This assumption ignores the reality that none of the circuits that have decided the scope of section 510, except the Fourth Circuit, have relied on their circuit's interpretation of the FLSA. *See infra* Part II. In fact, the Third Circuit has explicitly rejected Barclay-Strobel's assumption. *See Edwards*, 610 F.3d at 225 ("[T]he conclusion that internal complaints are protected under the FLSA does not require a parallel conclusion under ERISA's distinct statutory language."). It also fails to account for textual differences between section 510 and the antiretaliation provision of the FLSA, and for the fact that circuit courts of appeals have reached different conclusions as to whether section 510 or the antiretaliation provision of the FLSA is broader. *Compare Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 328 (2d Cir. 2005) (per curiam) (rejecting the district court's analysis interpreting the scope of section 510 by relying on circuit precedent interpreting the scope of the

This Comment provides a roadmap for courts to follow to interpret section 510, as it exists now, to encompass unsolicited, informal complaints to management concerning potential ERISA violations. Part I explains in broad terms the purpose of ERISA and how section 510 fits into ERISA's regulatory framework. Part II explains judicial treatment of section 510 and details the shortcomings of existing attempts to interpret its scope. Part III proposes an interpretation of section 510 that is faithful to both the statutory text and congressional intent and purpose. Part IV discusses the practical implications of a broad reading of the scope of section 510 and argues in favor of adopting such an interpretation.

I. ERISA: AN OVERVIEW

This Part provides an overview of ERISA and explains some of its enforcement provisions, including section 510. It also discusses the substantive law governing retaliation claims under ERISA and illustrates the importance of defining what types of activities section 510 protects.

Congress enacted ERISA to protect “the interests of participants in employee benefit plans and their beneficiaries” and to “provid[e] for appropriate remedies, sanctions, and ready access to the Federal courts” to correct interference with those interests.¹⁶ To accomplish this objective, ERISA imposes three types of regulations for all covered employee benefits plans: (1) reporting and disclosure requirements with respect to a plan's terms and finances,¹⁷ (2) standards of conduct for a plan's fiduciaries,¹⁸ and (3) exclusive jurisdiction of the federal courts to enforce ERISA's provisions.¹⁹ In addition to these basic requirements that apply to all covered employee benefits plans, ERISA imposes additional requirements upon employers with respect to pension plans and defined benefit plans.²⁰ These regulations include

FLSA, because section 510 “is unambiguously broader in scope than [the antiretaliation provision] of FLSA”, with *Edwards*, 610 F.3d at 224–25 (suggesting the scope of section 510 is actually narrower than the scope of the FLSA's antiretaliation provision). This Comment argues in favor of a broad interpretation of section 510 without regard to how the circuit split concerning the scope of the FLSA's antiretaliation provision is resolved. See *infra* Part III.

¹⁶ Employee Retirement Income Security Act of 1974 § 2(b), 29 U.S.C. § 1001(b) (2006).

¹⁷ PETER J. WIEDENBECK, *ERISA: PRINCIPLES OF EMPLOYEE BENEFIT LAW* 12 (2010) (citing 29 U.S.C. §§ 1021–1031).

¹⁸ *Id.* (citing 29 U.S.C. §§ 1101(a), 1104, 1106).

¹⁹ *Id.* (citing 29 U.S.C. §§ 1132, 1144).

²⁰ *Id.* at 12–13. An “employee benefit plan” is a “pension plan” if it “provides retirement income to employees, or . . . results in a deferral of income by employees for periods extending to the termination of

limitations on age and service conditions of plan membership;²¹ restrictions on terms of the plans;²² and, in the case of defined benefit plans, minimum benefit accrual rates,²³ minimum funding requirements,²⁴ insurance requirements,²⁵ and restrictions on plan termination.²⁶ At the same time Congress passed ERISA, Congress also modified the Internal Revenue Code to grant certain tax benefits to members of various types of employee benefits plans.²⁷

ERISA contains an enforcement provision that creates a cause of action for employees who are wrongfully terminated or face other types of adverse employment actions “taken to discourage or prevent them from gaining or asserting rights under an employee benefit plan.”²⁸ This provision is found in section 510, which states in relevant part:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan.²⁹

For example, an employee who is terminated because her pension benefits are about to vest has a federal cause of action against her employer under section 510.³⁰

In this regard, ERISA creates a cause of action for employees similar to that created by numerous other federal statutes that prohibit employers from

covered employment or beyond.” 29 U.S.C. § 1002(2)(A). A “defined benefit plan” is any type of “pension plan other than an individual account plan [or defined contribution plan].” *Id.* § 1002(35). The terms “individual account plan” and “defined contribution plan” are used interchangeably and refer to “a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant’s account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant’s account.” *Id.* § 1002(34).

²¹ 29 U.S.C. § 1052(a)(1)(A).

²² *Id.* §§ 1053, 1055, 1056(d)(1), (d)(3).

²³ *Id.* § 1054.

²⁴ *Id.* §§ 1081(a)(8), 1082–1085.

²⁵ *Id.* §§ 1321–1323.

²⁶ *Id.* § 1341.

²⁷ 26 U.S.C. §§ 4971–4980G.

²⁸ WIEDENBECK, *supra* note 17, at 171.

²⁹ 29 U.S.C. § 1140.

³⁰ *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612 (1993) (“We do not mean to suggest that an employer *lawfully* could fire an employee in order to prevent his pension benefits from vesting. Such conduct is actionable under § 510 of ERISA . . .”).

discriminating against their employees.³¹ In many ways, this provision is an extremely important part of ERISA's regulatory scheme because, without it, employees who attempt to assert their rights under ERISA would be vulnerable to any adverse employment action their employers choose to take against them.³² In fact, it has been noted that section 510 "is the linchpin of the whole matrix of federal pension and welfare benefit protections."³³

Like other antidiscrimination statutes,³⁴ ERISA contains a provision to protect employees who report violations of federal law from retaliation by their employers.³⁵ It states, "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."³⁶ To establish a prima facie case of retaliation under ERISA, a plaintiff must demonstrate that (1) she participated in an activity that ERISA protects, (2) she suffered an adverse employment action, and (3) there is a causal link between her participation in the protected activity and the adverse employment action she suffered.³⁷ If the plaintiff establishes a prima facie case, the burden of proof shifts to the employer to show there was a legitimate, nondiscriminatory reason for the adverse employment action.³⁸ If the employer meets this burden, the plaintiff can only prevail if she proves the stated reason is merely a pretext for prohibited discrimination.³⁹ However, if

³¹ The most well-known of the antidiscrimination statutes is undoubtedly Title VII of the Civil Rights Act of 1964. *See* 42 U.S.C. § 2000e–2000e-17. Title VII creates a cause of action for employees who face an adverse employment action because of the employee's "race, color, religion, sex, or national origin." *Id.* § 2000e-2(a)(1). Other well-known antidiscrimination statutes include the Age Discrimination in Employment Act of 1967 (ADEA), which makes it unlawful for certain employers to discriminate against some employees because of an employee's age, 29 U.S.C. § 623, and the Americans with Disabilities Act (ADA), which, among other things, makes it unlawful for certain employers to discriminate against employees on the basis of an employee's disability, 42 U.S.C. § 12112 (2006 & Supp. II 2009).

³² WIEDENBECK, *supra* note 17, at 171–72.

³³ *Id.* at 171.

³⁴ The antiretaliation provision of Title VII is codified at 42 U.S.C. § 2000e-3(a), the antiretaliation provision of the ADEA is codified at 29 U.S.C. § 623(d), and the antiretaliation provision of the ADA is codified at 42 U.S.C. § 12203.

³⁵ Employee Retirement Income Security Act of 1974 § 510, 29 U.S.C. § 1140.

³⁶ *Id.*

³⁷ *Hamilton v. Starcom Mediainvest Grp., Inc.*, 522 F.3d 623, 628 (6th Cir. 2008). The elements of the plaintiff's prima facie case of retaliation under ERISA are borrowed from and substantially the same as the elements of the plaintiff's prima facie case of retaliation under Title VII. *See Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 258 (4th Cir. 1998) (stating the three elements of a plaintiff's prima facie case of retaliation under Title VII).

³⁸ *Manning v. Am. Republic Ins. Co.*, 604 F.3d 1030, 1042 (8th Cir. 2010).

³⁹ *Id.*

the plaintiff is unable to establish a prima facie case of retaliation, the plaintiff's claim cannot survive summary judgment.⁴⁰

In light of this framework, defining what types of activities are protected for the purposes of section 510 becomes critically important. Indeed, how broadly or narrowly protected activity is defined has the potential to determine directly whether the plaintiff's claim can survive summary judgment. If an unsolicited, informal complaint to management is not a protected activity for the purposes of section 510, then an employee who makes this type of complaint cannot prevail against her employer in a suit for retaliation. Absent other discrimination in violation of another federal law, the employee would have no federal cause of action. However, if an unsolicited, informal complaint to management is a protected activity for the purposes of section 510, the plaintiff may be able to establish a prima facie case of retaliation and may be able to survive summary judgment. Thus, the definition of what constitutes a protected activity for purposes of section 510 operates as a gatekeeper for determining what claims might or might not be able to get past summary judgment in federal court.

II. JUDICIAL CONFUSION IN INTERPRETING SECTION 510

Despite the importance of appropriately defining what types of activities are protected by section 510, the courts that have confronted this issue have been anything but consistent. This Part explains and analyzes the reasoning underlying the different approaches courts have taken to interpreting the scope of section 510. Section A analyzes the decisions of courts concluding section 510 is broad enough to encompass an employee's informal, unsolicited complaints to management. Section B considers the decisions of courts concluding these types of complaints fall outside section 510's scope.

A. The Broad Approach: Informal, Unsolicited Complaints to Management Are Within the Scope of Section 510

The Ninth Circuit has taken the broadest approach of all the courts to analyze the scope of section 510. In *Hashimoto v. Bank of Hawaii*, an employee of the Bank of Hawaii complained to two supervisors that they had violated several reporting and disclosure requirements as well as certain

⁴⁰ See *id.* at 1043 (affirming the district court's grant of summary judgment to the defendant because the plaintiff did not prove all three elements of the prima facie case).

fiduciary standards imposed by ERISA on the administration of the bank's employee benefits plan.⁴¹ The bank terminated the employee, and the employee filed suit.⁴²

At issue before the Ninth Circuit on appeal was whether the employee's suit against the bank fell within the scope of ERISA such that it preempted the employee's state law wrongful discharge claim.⁴³ To answer this question, the Ninth Circuit had to decide whether an employee's unsolicited, informal complaint to management is within the scope of section 510.⁴⁴ The Ninth Circuit spoke broadly about the purpose of section 510, stating the provision "is clearly meant to protect whistle blowers."⁴⁵ The court's reasoning, however, is somewhat sparse in that the court did not perform a textual analysis of the provision and did not consider the legislative history of ERISA in general or section 510 in particular.⁴⁶ Instead, the court based its analysis on the effect a more narrow interpretation of section 510 would have on whistleblowers.⁴⁷ The court explained that although the language of the antiretaliation provision mentions "giving information or testifying,"⁴⁸ "[t]he normal first step in giving information or testifying . . . [is] to present the problem first to the responsible managers of the ERISA plan."⁴⁹ As such, if informal, unsolicited complaints to management fall outside the scope of section 510, "the process of giving information or testifying is interrupted at its start: the anticipatory discharge discourages the whistle blower before the whistle is blown."⁵⁰ Based

⁴¹ 999 F.2d 408, 409 (9th Cir. 1993). Specifically, the employee alleged that her two supervisors directed her to improperly reimburse a former employee from a profit-sharing benefits plan and to recalculate the benefit owed to a former employee based on final pay, as opposed to final average pay, which is required by ERISA. *Id.* at 410.

⁴² *Id.* at 409–10.

⁴³ *Id.* at 410. Section 514(a) of ERISA contains a broad preemption provision that states that the provisions of ERISA "shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan [subject to regulation under ERISA]." 29 U.S.C. § 1144(a) (2006); *see also* WIEDENBECK, *supra* note 17, at 185. For a more complete discussion of the implications of preemption in the context of section 510, see *infra* Part IV.B.

⁴⁴ *Hashimoto*, 999 F.2d at 411.

⁴⁵ *Id.*

⁴⁶ *Id.*; *see also* *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 223 (3d Cir. 2010) (noting that the Ninth Circuit in *Hashimoto* failed to "examine[] the statutory language of Section 510 in detail"), *cert. denied*, 131 S. Ct. 1604 (2011).

⁴⁷ *See Hashimoto*, 999 F.2d at 411. The Third Circuit describes the Ninth Circuit's approach as focusing "on the adoption of a 'fair' interpretation." *Edwards*, 610 F.3d at 223 (citation omitted) (citing *Hashimoto*, 999 F.2d at 411).

⁴⁸ *Hashimoto*, 999 F.2d at 411 (construing 29 U.S.C. § 1140).

⁴⁹ *Id.*

⁵⁰ *Id.*

on this reasoning, the court held that informal, unsolicited complaints of management about ERISA violations fall within the scope of the provision.⁵¹

The Fifth Circuit has also held that unsolicited, informal complaints to management about ERISA violations are within the scope of section 510.⁵² The Fifth Circuit's treatment of the issue, however, was quite superficial and almost entirely without reasoning or explanation.⁵³ The court merely stated:

ERISA § 510 broadly prohibits the termination or other adverse treatment of participants and beneficiaries for exercising their ERISA rights or for the purpose of interfering with the attainment of such rights, and prohibits the discharge or other adverse treatment of any person because he has given information or testimony relating to ERISA.⁵⁴

About the only support given for the proposition is a citation with approval⁵⁵ to a Minnesota district court case, *McLean v. Carlson Companies*.⁵⁶

McLean purports to be the first case to consider whether informal, unsolicited complaints to management concerning ERISA violations are within the scope of section 510.⁵⁷ In *McLean*, the defendant employer terminated the plaintiff's employment because the plaintiff told her manager about potential ERISA violations "in connection with the administration of the employee benefit plan."⁵⁸ The plaintiff then sued her employer for violating the state's whistle-blower statute.⁵⁹ As in *Hashimoto*, the issue before the court was whether ERISA preempted the plaintiff's state law claim.⁶⁰ If section 510 were broad enough to encompass unsolicited, informal complaints to management,

⁵¹ *Id.* As a consequence of this holding, the court also held that ERISA preempts state law claims for retaliatory discharge when an employee is discharged in retaliation for making an unsolicited, informal complaint to management about a violation of ERISA. *Id.* at 412.

⁵² *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311, 1313–15 (5th Cir. 1994).

⁵³ *See id.*; *see also* *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 223 (3d Cir. 2010) ("[T]he Fifth Circuit gave the issue cursory treatment" (citing *Anderson*, 11 F.3d at 1314)), *cert. denied*, 131 S. Ct. 1604 (2011).

⁵⁴ *Anderson*, 11 F.3d at 1315 (citing 29 U.S.C. § 1140 (2006)).

⁵⁵ *Id.* at 1315 n.5.

⁵⁶ 777 F. Supp. 1480 (D. Minn. 1991). The interpretation adopted in *McLean* has been upheld even after other circuits have adopted contrary interpretations. *See* *Simons v. Midwest Tel. Sales & Serv., Inc.*, 462 F. Supp. 2d 1004, 1008 (D. Minn. 2006).

⁵⁷ *See McLean*, 777 F. Supp. at 1483 ("The parties have not cited, and the court is unable to find, a case addressing this precise issue.")

⁵⁸ *Id.* at 1481.

⁵⁹ *Id.* at 1481 & n.1.

⁶⁰ *Id.* at 1482.

ERISA would preempt any state law claims. The dispositive issue was the same as in *Hashimoto*: the scope of section 510.⁶¹

The court began by noting that ERISA lacks any specific “provision which provides plaintiff the specific right to report violations of federal law to her superiors or those responsible for the plan’s administration.”⁶² Nevertheless, the court reasoned, ERISA explicitly gives individuals “the right to sue to enjoin any act or practice which violates ERISA.”⁶³ The plaintiff clearly would have had a cause of action against her employer had she been terminated after filing suit against the employer, alleging violations of ERISA.⁶⁴ Yet, the court explained, to interpret the antiretaliation provision in such a way that the plaintiff was only protected after commencing a lawsuit against the employer would encourage unnecessary litigation by “provid[ing] a strong incentive to plan participants to institute litigation without first attempting to resolve the issue informally.”⁶⁵ Based on this reasoning, the court “f[ound] it logical to infer that plaintiff also possesse[d] the right to inform plan administrators of suspected violations of ERISA” prior to filing suit.⁶⁶ The court concluded that informal, unsolicited complaints to management are protected activities within the scope of section 510.⁶⁷

The Ninth Circuit in *Hashimoto*⁶⁸ and the Minnesota district court in *McLean*⁶⁹ (cited with approval by the Fifth Circuit in *Anderson*⁷⁰) both concluded that informal, unsolicited complaints by management fall within the scope of section 510. They reached this conclusion, however, on different grounds. The Ninth Circuit’s reasoning in *Hashimoto* was grounded in an interpretation of section 510 that focused primarily on the rights of whistle-blowers and on promoting an ideal of fairness.⁷¹ By contrast, the Minnesota district court’s reasoning was not focused on the rights of employees but

⁶¹ *Id.* at 1483.

⁶² *Id.* at 1484.

⁶³ *Id.* (citing Employee Retirement Income Security Act of 1974 § 502(a)(3), 29 U.S.C. § 1132(a)(3) (2006)).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ 999 F.2d 408, 411 (9th Cir. 1993).

⁶⁹ *McLean*, 777 F. Supp. at 1484.

⁷⁰ *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311, 1315 (5th Cir. 1994).

⁷¹ *See* 999 F.2d at 411; *see also* *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 223 (3d Cir. 2010) (“[T]he Ninth Circuit appeared to focus its analysis on the adoption of a ‘fair’ interpretation.” (citation omitted) (citing *Hashimoto*, 999 F.2d at 411)), *cert. denied*, 131 S. Ct. 1604 (2011).

instead on the efficacy of the process for reporting ERISA violations—in particular, the public policy against implementing rules that encourage litigation.⁷²

Although grounded in different rationales, neither the Ninth Circuit in *Hashimoto* nor the Minnesota district court in *McLean* embarked in any detail on any kind of textual analysis or analysis of the legislative history of ERISA in general or section 510 in particular. The approaches of both courts are curious in that courts, when analyzing a statutory provision, typically begin their analyses with the text of the statute.⁷³ Yet the Ninth Circuit in *Hashimoto* and the district court in *McLean* did not attempt to explain section 510's text at all. For example, both courts failed to discuss the fact that section 510 contains the words “has given information” and “has testified or is about to testify”⁷⁴ and did not attempt to explain whether the phrase “in any inquiry or proceeding”⁷⁵ qualifies or limits an employee's right to pursue a cause of action for retaliation under section 510. Instead, both courts merely glossed over the text of the statute. The Ninth Circuit then jumped directly into an analysis of protecting the rights of whistle-blowers and promoting fundamental fairness,⁷⁶ and the Minnesota district court grounded its rationale in a desire to improve the efficiency of the process for reporting and correcting ERISA violations.⁷⁷ Perhaps this explains why the Third Circuit, in *Edwards*, criticized the reasoning of the decisions interpreting section 510 to create a cause of action for employees who face adverse employment actions for making informal, unsolicited reports of ERISA violations to management.⁷⁸

B. The Narrow Approach: Unsolicited, Informal Complaints to Management Fall Outside the Scope of Section 510

The Ninth Circuit, Fifth Circuit, and Minnesota district court all took a broad approach to defining the scope of section 510. By contrast, the Second Circuit,⁷⁹ Third Circuit,⁸⁰ and Fourth Circuit⁸¹ have interpreted section 510

⁷² *McLean*, 777 F. Supp. at 1484.

⁷³ See EVA H. HANKS ET AL., ELEMENTS OF LAW 275 (1994) (“It is commonplace that statutory interpretation must begin with the words of the statute.”); see also *infra* Part III.A.

⁷⁴ 29 U.S.C. § 1140 (2006).

⁷⁵ *Id.*

⁷⁶ *Hashimoto v. Bank of Haw.*, 999 F.2d 408, 411 (9th Cir. 1993).

⁷⁷ *McLean*, 777 F. Supp. at 1484.

⁷⁸ *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 223 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 1604 (2011).

⁷⁹ See *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 330 (2d Cir. 2005) (per curiam).

more narrowly, holding that informal, unsolicited complaints to management fall outside its scope. Although all three of these circuits engage in a more conventional statutory analysis than the Ninth Circuit did in *Hashimoto* or the district court did in *McLean*,⁸² each reasons through the statutory analysis differently, and none adequately interprets section 510 in light of congressional intent.

The Second Circuit, in *Nicolaou v. Horizon Media, Inc.*,⁸³ takes what is perhaps the broadest approach of the circuit courts that conclude that unsolicited, informal complaints to management about violations of ERISA fall outside the scope of section 510. *Nicolaou* involved an employee who discovered that her employer was underfunding the company's 401(k) plan.⁸⁴ Upon discovering the discrepancy, the employee expressed her concern to the company's chief financial officer, who advised her to drop the matter.⁸⁵ The employee then took her complaint to the company's president, who demoted the employee from director of human resources and administration, to office manager, and then terminated her a short time later.⁸⁶ The employee filed suit alleging, among other things, that her termination violated section 510.⁸⁷

To determine whether the district court had properly granted the employer's 12(b)(6) motion to dismiss, the Second Circuit had to decide whether the employee's termination could constitute a violation of section 510.⁸⁸ The answer to this question depended entirely on the provision's scope.⁸⁹ The Second Circuit began its analysis by examining the plain language of section 510.⁹⁰ The court noted that the statute, on its face, protects employees who participate in an "inquiry or proceeding."⁹¹ According to the court, the inclusion of both the word "inquiry" and the word "proceeding" in the statute suggests that both formal and informal complaints fall within the

⁸⁰ See *Edwards*, 403 F.3d at 217.

⁸¹ See *King v. Marriott Int'l, Inc.*, 337 F.3d 421, 427–28 (4th Cir. 2003).

⁸² For a discussion of varying methods of statutory interpretation, see generally HANKS ET AL., *supra* note 73, at 267–90.

⁸³ *Nicolaou*, 402 F.3d 325.

⁸⁴ *Id.* at 326.

⁸⁵ *Id.*

⁸⁶ *Id.* at 326–27.

⁸⁷ *Id.* at 327.

⁸⁸ *Id.* at 327–28.

⁸⁹ *Id.* at 328.

⁹⁰ *Id.* at 328–29.

⁹¹ *Id.* at 328 (emphasis omitted) (quoting Employee Retirement Income Security Act of 1974 § 510, 29 U.S.C. § 1140 (2006)).

scope of activities protected by section 510.⁹² The court found further support for this conclusion in the fact that the plain language of section 510 contains the phrase “[has] given information” in addition to “has testified or is about to testify,” suggesting that Congress intended the provision to protect employees who engage in both formal and informal activities.⁹³

Having concluded that the formality of the setting in which the plaintiff’s complaint took place was not determinative of whether the activity the plaintiff participated in fell within the scope of section 510, the court then turned to the question of what types of activities constitute an “inquiry” or “proceeding.”⁹⁴ According to the court, this issue was the touchstone of the analysis of whether the activity the plaintiff was engaged in falls within the scope of section 510.⁹⁵ The court first noted that “[t]he ‘informal *gathering* of information’ . . . falls within the plain meaning of ‘inquiry,’ and . . . is protected by Section 510.”⁹⁶ The court suggested, however, that the fact that the corporation’s outside counsel told the plaintiff to meet with the company’s president to discuss the plaintiff’s concerns was a crucial factor in determining that the plaintiff’s complaint to the president was an “inquiry” that fell within the scope of section 510.⁹⁷ The court stated, “Certainly, if [the plaintiff] can demonstrate that she *was contacted* to meet with [the president] in order to give information about the alleged underfunding of the Plan, her actions would fall within the protection of Section 510.”⁹⁸ By implication, the court seemed to suggest that, had the plaintiff gone to the company’s president on her own accord (i.e., without the suggestion of the company’s outside counsel), the plaintiff’s informal, unsolicited complaint would have fallen outside the scope of section 510.⁹⁹ *Nicolaou* seems to suggest that, although solicited, informal complaints

⁹² *Id.* at 328–29.

⁹³ *Id.* at 329 (alteration in original) (emphasis omitted) (quoting 29 U.S.C. § 1140).

⁹⁴ *Id.*

⁹⁵ *Id.* at 328–29.

⁹⁶ *Id.* at 329 (emphasis added).

⁹⁷ *Id.* at 329–30.

⁹⁸ *Id.* at 330 (emphasis added).

⁹⁹ The Third Circuit certainly reads *Nicolaou* as concluding that unsolicited, informal complaints to management fall outside the scope of section 510’s antiretaliation provision. *See* *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 220 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 1604 (2011). However, whether it is necessary that the plaintiff’s complaint be made in response to a suggestion by a supervisor or someone who represents management to be considered a protected activity within the scope of section 510 is somewhat unclear following *Nicolaou*. That is, it is unclear whether the outcome in *Nicolaou* would have been different had the plaintiff made an unsolicited complaint to the company’s president, as opposed to only making a complaint after being encouraged to do so by the company’s outside counsel. *See, e.g., Ello v. Singh*, 531 F. Supp. 2d 552, 573 (S.D.N.Y. 2007) (“While Plaintiff does not allege he was responding to, or providing

to management are protected activities, unsolicited, informal complaints to management are not protected activities and fall outside the scope of section 510.¹⁰⁰ That is, the Second Circuit's approach in *Nicolaou* seems to turn on whether the plaintiff or management initiates the complaint. If the plaintiff initiates the complaint, the complaint does not fall within the scope of the statute's protection, and the plaintiff cannot make out the first element of her prima facie case.¹⁰¹ If management approaches the plaintiff, however, then the complaint falls within the scope of the statute's protection, and the plaintiff can establish the first element of her prima facie case.¹⁰²

This interpretation of section 510 is problematic because it is virtually impossible to apply in practice. First, there is an unanswered question as to when an "inquiry" has occurred under the court's definition of the word. On the one hand, the court seems to be suggesting that whether the plaintiff has engaged in an "inquiry" depends on whether the plaintiff or management initiates the conversation. On the other hand, it could be the case that an employee who approaches management faces a barrage of questions by the employer concerning the allegations that the employee is attempting to report. The court's opinion in *Nicolaou* provides no guidance as to how to evaluate when the meeting between the plaintiff and management becomes an "inquiry." Is it as soon as the management representative asks the plaintiff a single question? If not, when would the informal meeting between the plaintiff and management become an "inquiry" under the test applied by the Second Circuit in *Nicolaou*?

Even more problematic, however, is the perverse incentives the court's interpretation of the word "inquiry" creates for the employer. Regardless of which way *Nicolaou* is applied, the employer has a strong incentive not to ask questions or further investigate when an employee makes an informal complaint to management that an ERISA violation is occurring. Under *Nicolaou*, it seems clear that, when the plaintiff makes an informal complaint to management and the employer does nothing in response, the plaintiff has not

information to, a formal inquiry, Plaintiff's claims regarding his alleged efforts at scheduling a meeting with decision-makers and those who might begin a formal inquiry, could constitute a Section 510 claim."). Accordingly, this Comment has characterized the Second Circuit's approach as the broadest of the approaches that conclude that unsolicited, informal complaints to management are not within the scope of section 510's antiretaliation provision. See *supra* text accompanying note 83.

¹⁰⁰ See *supra* note 99.

¹⁰¹ See *supra* notes 38–40 and accompanying text.

¹⁰² See *supra* notes 38–40 and accompanying text.

engaged in a protected activity and can be terminated in retaliation without imposing liability on the employer under section 510. However, if the employer initiates the “inquiry,” or if the employer begins an investigation into the plaintiff’s allegations, the interaction between the employee and management may very well qualify as an “inquiry” under the Second Circuit’s definition of the word. The consequence of the employer creating an “inquiry” is that the employee’s complaint falls within the scope of section 510. That is, the employer is subject to liability if the employer takes any adverse employment action against the employee. The employer could avoid liability by simply failing to do anything in response to the employee’s unsolicited complaint. Under the rule in *Nicolaou*, then, the employer’s best course of action may very well be to ignore an employee’s unsolicited complaints about ERISA violations and do absolutely nothing in response to them.

In spite of the problems with this rule, the Third Circuit seems to have adopted, at least in part, the rule from *Nicolaou* in *Edwards v. A.H. Cornell & Son, Inc.*¹⁰³ In *Edwards*, the human resources director of a family-owned company discovered that corporate management was committing several ERISA violations with respect to the company’s group health insurance plan.¹⁰⁴ Specifically, the human resources director discovered that management was administering the plan in a discriminatory manner, attempting to discourage employees from participating in the plan by misrepresenting the cost of coverage under the plan, and providing made-up social security numbers and other false information to insurance companies to enroll noncitizens in the plan.¹⁰⁵ The human resources director voiced her objection to management concerning these practices and was terminated in retaliation.¹⁰⁶ She filed suit, alleging that her termination violated section 510.¹⁰⁷

The district court, relying on *Nicolaou*, granted the employer’s 12(b)(6) motion to dismiss.¹⁰⁸ The Third Circuit affirmed.¹⁰⁹ After noting the circuit split on whether unsolicited, informal complaints to management fall within

¹⁰³ 610 F.3d at 225–26. At least one district court in a circuit that has not yet decided the scope of section 510’s antiretaliation provision has followed *Edwards*. See *George v. Junior Achievement of Cent. Ind.*, No. 1:10-cv-0220-JMS-MJD, 2011 WL 4537006, at *6–7 (S.D. Ind. Sept. 28, 2011).

¹⁰⁴ *Edwards*, 610 F.3d at 218–19.

¹⁰⁵ *Id.* at 219.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Edwards v. A.H. Cornell & Son, Inc.*, No. 09-cv-1184, 2009 WL 2215074, at *5 (E.D. Pa. July 23, 2009), *aff’d*, 610 F.3d 217, *cert. denied*, 131 S. Ct. 1604 (2011).

¹⁰⁹ *Edwards*, 610 F.3d at 220.

the scope of section 510, the Third Circuit embarked on a fairly conventional statutory analysis by beginning with the plain text of the statute.¹¹⁰ The threshold question, then, was whether the text of the antiretaliation provision is ambiguous.¹¹¹ The court concluded that the provision is unambiguous.¹¹² That is, by its text, the provision only applies when an employee testifies or gives information as part of an “inquiry or proceeding.”¹¹³

The court in *Edwards* then adopted the same definition of “inquiry” that the Second Circuit adopted in *Nicolaou*.¹¹⁴ The determinative question of whether the employee’s informal complaint to management constitutes an “inquiry” is whether the complaint is solicited or unsolicited.¹¹⁵ Because the human resources director in *Edwards* approached management, as opposed to management approaching her, the human resources director’s complaint to management did not fall within the scope of section 510, and she could not establish the first element of her prima facie case of retaliation.¹¹⁶ The court also noted that the human resources director did not make her complaint in the context of a “proceeding,” because the term “proceeding” implies a certain level of formality that is not present when an employee makes an informal, internal complaint to management.¹¹⁷ Therefore, her complaint failed to state a cause of action for which relief could be granted, and dismissal under 12(b)(6) was appropriate.¹¹⁸

The Third Circuit’s approach in *Edwards* is problematic for largely the same reasons as the Second Circuit’s approach in *Nicolaou*. That is, the definition of “inquiry” in *Edwards*, like the definition of “inquiry” in *Nicolaou*,

¹¹⁰ *Id.* at 222; see also *infra* Part III.A.

¹¹¹ *Edwards*, 610 F.3d at 222.

¹¹² See *id.* at 222–24. The court does not explain how the statute’s language is unambiguous in light of the fact that various circuit courts of appeals interpreted the statute in vastly different ways. The court seems to suggest, however, that the other circuits inappropriately focused on policy and ignored the plain text of the statute. See *id.*

¹¹³ *Id.* at 222 (quoting Employee Retirement Income Security Act of 1974 § 510, 29 U.S.C. § 1140 (2006)) (internal quotation marks omitted).

¹¹⁴ *Id.* at 223. Notably, the court does not consider other possible definitions of the term “inquiry” and does not explain whether the fact that the word “inquiry” is not defined by the statute makes the statute ambiguous and therefore susceptible to a deeper analysis. The court brushes aside these concerns and merely states, “[W]e find the provision’s plain meaning to be clear.” *Id.* at 224.

¹¹⁵ See *id.* at 223.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 225–26.

creates perverse incentives for the employer. The dissent in *Edwards* recognizes this concern, posing the following hypothetical:

[S]uppose an employee like [the human resources director] complains to her superior, the superior asks some follow-up questions, and the employee responds to these questions. Are the informal responses to some impromptu questions to be regarded as protected because they evidently were made as part of an “inquiry?” In turn, why should such responses be protected while, at the same time, an employer is essentially permitted (and perhaps, in essence, encouraged) to fire an employee immediately after she makes an informal complaint instead of conducting an investigation of some sort?¹¹⁹

The majority in *Edwards* even acknowledges that the human resources director’s complaints “may have eventually ‘culminat[ed]’ in an inquiry”¹²⁰ but concludes only that this further “underscores the fact that the complaints themselves, without more, do not constitute an inquiry.”¹²¹ Thus, the majority seems to concede that even an unsolicited, informal complaint to management could eventually become an “inquiry.” However, such a complaint would only become an “inquiry” and would thus only constitute a statutorily protected activity under section 510, based on the employer’s conduct after the employee makes her complaint. That is, “‘inquiry’ includes only inquiries made *of* an employee, not inquiries made *by* an employee.”¹²² Under this reasoning, an employer faced with an unsolicited, informal complaint by an employee concerning an ERISA violation would minimize its potential liability by immediately terminating the employee and not investigating the allegations further. Yet this result is contrary to what Congress intended when it passed ERISA.¹²³

Perhaps this asymmetry explains why the Fourth Circuit concluded that the touchstone for what constitutes a protected activity under section 510 is not whether the employee or management was the driving force behind the complaint but rather the formality of the setting in which the complaint occurred.¹²⁴ *King v. Marriott International, Inc.* involved an employee who helped manage her employer’s benefit-plan finances as the vice president of

¹¹⁹ *Id.* at 228 (Cowen, J., dissenting).

¹²⁰ *Id.* at 223 (majority opinion) (alteration in original).

¹²¹ *Id.*

¹²² *Id.* (emphases added).

¹²³ See *infra* Part III.C.

¹²⁴ See *King v. Marriott Int’l, Inc.*, 337 F.3d 421, 427 (4th Cir. 2003).

benefits resources.¹²⁵ During the course of her employment, this employee discovered that the senior vice president of compensation and benefits had proposed transferring millions of dollars from the company's health benefit plan into its general corporate reserve account.¹²⁶ Fearing that the senior vice president's plan might violate ERISA, the employee told the senior vice president and the company's in house counsel on multiple occasions that the proposed transfer should be scrapped.¹²⁷ Instead of listening to the employee's concerns, however, the senior vice president decided to terminate her.¹²⁸ The stated reason for the employee's termination was that their "continuing feud" about whether money should be transferred from the company's health benefit plan to the general reserve account "hindered the operation of the benefits department."¹²⁹

The employee filed suit in state court against her former employer, alleging that her termination was unlawful under state law.¹³⁰ Her former employer removed the case to federal court, arguing that ERISA preempted the plaintiff's state law claims.¹³¹ The plaintiff filed a motion to remand or, in the alternative, to amend her complaint to allege unlawful retaliation under section 502 and section 510 of ERISA.¹³² The district court denied the plaintiff's motion to remand but granted the plaintiff's motion to amend her complaint.¹³³ The district court then granted the defendant's motion for summary judgment on all claims, and the plaintiff appealed.¹³⁴

¹²⁵ *Id.* at 423.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 423, 425–27. Section 502(a)(3) of ERISA states, "A civil action may be brought . . . by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) 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." 29 U.S.C. § 1132(a)(3) (2006). The antiretaliation provision of section 510 is the specific provision "of this subchapter" the plaintiff sought to enforce in her amended complaint. *See King*, 337 F.3d at 425. In essence, the plaintiff's amended complaint alleged that she had a cause of action under section 502 by virtue of the antiretaliation provision of section 510. *See id.* This technicality is not important to the court's analysis of the issues this Comment is concerned with. As such, this Comment treats the plaintiff's amended complaint as if she had merely alleged unlawful retaliation in violation of section 510. This is consistent with the way the Fourth Circuit treats the plaintiff's amended complaint in its decision. *See id.* at 427–28.

¹³³ *King*, 337 F.3d at 423–24.

¹³⁴ *Id.* at 424.

On appeal, the central issue before the Fourth Circuit was whether the plaintiff's state law claims were preempted by ERISA.¹³⁵ To determine the answer, the court first had to determine whether the plaintiff alleged a violation of section 510.¹³⁶ If the plaintiff's complaint to the senior vice president was a protected activity within the scope of section 510, then the plaintiff could establish a prima facie case of unlawful retaliation, and the employer's termination of the plaintiff may have violated section 510. However, if the plaintiff's complaint to the senior vice president was not a protected activity within the scope of section 510, then the employer's termination of the plaintiff for making a complaint about potential ERISA violations would not have violated federal law. As a result, the determinative question in *King* was whether an informal, unsolicited complaint to management concerning potential ERISA violations falls within the scope of the protection afforded to employees by section 510.¹³⁷

To begin its analysis, the Fourth Circuit cited the relevant text of section 510.¹³⁸ Curiously, however, the Fourth Circuit's analysis paid little attention to one part of section 510's text.¹³⁹ That is, although section 510 on its face applies to "any person" who has *either* "given information *or* has testified or is about to testify,"¹⁴⁰ the court essentially focused its analysis only on the statutory language that makes reference to *testimony* in an "inquiry or proceeding," treating the language "has given information" as merely ensuring that employees who provide information in other than a testimonial form (e.g., providing documents) during a formal "inquiry" or "proceeding" are protected from retaliation, in essence relegating the language "has given information" almost to the level of mere surplusage.¹⁴¹

According to the Fourth Circuit, then, only employees who give testimony within the limited context of a formal "inquiry" or "proceeding" are protected

¹³⁵ *Id.*

¹³⁶ *Id.* at 426–27.

¹³⁷ *Id.* at 427.

¹³⁸ *Id.*

¹³⁹ *See id.*

¹⁴⁰ 29 U.S.C. § 1140 (2006) (emphasis added).

¹⁴¹ *See King*, 337 F.3d at 427 ("In the instant case, . . . the use of the phrase 'testified or is about to testify' does suggest that the phrase 'inquir[ies] or proceed[ing]s' referenced in section 510 is limited to the legal or administrative, or at least to something more formal than written or oral complaints made to a supervisor. The phrase 'given information' does no more than insure that even the provision of non-testimonial information (such as incriminating documents) in an inquiry or proceeding would be covered." (alterations in original) (quoting 29 U.S.C. § 1140)).

from retaliation under section 510. The court then reasoned that an “intra-company complaint” is not an “inquiry or proceeding” because it does not have the requisite level of “formal[ity]” to be fairly considered as an “inquiry or proceeding.”¹⁴² Borrowing from Fourth Circuit precedent interpreting the antiretaliation provision of the Fair Labor Standards Act¹⁴³ (FLSA), the court suggested that the scope of section 510 is limited to “administrative or legal proceedings,” specifically “procedures conducted in judicial or administrative tribunals.”¹⁴⁴ This is an exceedingly narrow standard; under this reading of the statute, even a formal, internal “proceeding” within the corporation would not qualify as an “inquiry” or “proceeding” for purposes of section 510.

There are several problems with the Fourth Circuit’s analysis. First, although the court proclaims that its interpretation is “the most compelling interpretation of the statutory language,”¹⁴⁵ the interpretation of the scope of the provision is far narrower than the statutory language requires on its face. The statute itself does not define the terms “inquiry” or “proceeding” and contains no language suggesting that an “inquiry” or “proceeding” is limited to a formal judicial or administrative setting.¹⁴⁶ In fact, the Fourth Circuit’s definition of “proceeding” is borrowed from the FLSA, an entirely different statute.¹⁴⁷ Yet the court makes no attempt to justify its bare assertion that the level of formality it would require for a complaint to be a protected activity for retaliation purposes in the context of the FLSA is the same as in the context of section 510.¹⁴⁸ In fact, it is not clear that the scope of these two provisions is identical, especially given the fact that the statutory language of the antiretaliation provision of the FLSA¹⁴⁹ differs in many important respects from the statutory language of section 510. For one, the antiretaliation provision of the FLSA does not contain the language “has given information” or the phrase “any inquiry,” two terms that suggest the scope of section 510 may be broader than the scope of the antiretaliation provision of the FLSA, in spite of the fact that both statutes use the word “proceeding” and make reference to “testifying.”¹⁵⁰ Second, as this Comment explains in more detail in

¹⁴² *Id.*

¹⁴³ Fair Labor Standards Act of 1938 § 15(a)(3), 29 U.S.C. § 215(a)(3).

¹⁴⁴ *King*, 337 F.3d at 427 (internal quotation mark omitted) (citing *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 364 (4th Cir. 2000)).

¹⁴⁵ *Id.* at 428.

¹⁴⁶ *See* 29 U.S.C. § 1140.

¹⁴⁷ *See King*, 337 F.3d at 427.

¹⁴⁸ *See id.*

¹⁴⁹ *See infra* text accompanying notes 183–86.

¹⁵⁰ *See supra* note 15.

Part III.A, the Fourth Circuit's limiting interpretation of the phrase "has given information" is not the only possible interpretation of the text of section 510 taken as a whole, nor is it necessarily the most intuitive interpretation of that text. For these reasons, even on a textual level, the Fourth Circuit's interpretation of section 510 does not seem to pass muster.

On a purposive level, the flaws of the Fourth Circuit's analysis are even more apparent. For one, the Fourth Circuit's interpretation completely ignores Congress's intent in enacting ERISA and fails to consider the role of section 510 in the legislative scheme Congress enacted when it passed ERISA.¹⁵¹ Even more fundamentally, however, the Fourth Circuit's narrow interpretation of section 510 hinders the enforcement of the substantive provisions of ERISA and leads to excessive litigation by creating perverse incentives for employees who discover ERISA violations. Under the Fourth Circuit's approach, an informed employee¹⁵² who discovers a potential ERISA violation would have a disincentive to informally report the violation to management because she could be fired in retaliation with no recourse under federal law. Her incentive would be instead to make the complaint within the context of an "inquiry" or "proceeding," which the Fourth Circuit has interpreted only to include "administrative or legal proceedings."¹⁵³ This incentive creates an unnecessary burden on administrative and judicial bodies and may in fact undermine the purpose of ERISA because of the expense associated with initiating an "administrative or legal proceeding."¹⁵⁴

This Part has demonstrated that current judicial interpretations of the scope of section 510 have failed to interpret section 510 in a way that is faithful to both the plain text of the statute and Congress's intent in passing ERISA. The decisions concluding that informal, unsolicited complaints to management are statutorily protected activities under section 510 have concentrated either on the substantive purpose of ERISA or on procedural efficiency, at the expense of the provision's text.¹⁵⁵ From a statutory-interpretation perspective, the

¹⁵¹ See *infra* note 189 and accompanying text.

¹⁵² It is not unreasonable to assume that such an employee would be well-informed enough to recognize this disincentive because many employees who are in a position to discover potential ERISA violations by their employers are likely human resources professionals who work with employee benefits on a day-to-day basis and have a working knowledge of ERISA. Alternatively, an employee who discovers a potential ERISA violation may choose to consult with her attorney, who would presumably advise her not to make an informal complaint to management because such a complaint would afford her no protection from retaliation.

¹⁵³ *King*, 337 F.3d at 427.

¹⁵⁴ See *infra* note 221 and accompanying text.

¹⁵⁵ See *supra* Part II.A.

analyses of these courts are not very satisfying and have not been widely adopted among the circuit courts of appeals. At the same time, the courts that have held that informal, unsolicited complaints to management fall outside the scope of section 510 have focused too much on the plain text of the statute at the expense of congressional intent. These courts have either been too quick to consider the text of the statute unambiguous or have ignored ERISA's remedial purpose and congressional intent, not to mention the role of section 510 in the legislative scheme created by Congress by enacting ERISA. This has created perverse incentives both for employers and employees that frustrate the achievement of Congress's objectives in passing ERISA.

III. A PRAGMATIC INTERPRETATION OF SECTION 510

This Part attempts to bridge the gap between the two types of approaches explained in Part II. It argues in favor of a pragmatic interpretation of section 510 grounded in the statutory language yet faithful to congressional intent and purpose. Section A begins with the plain text of the statute and proposes a reading of section 510 that allows informal, unsolicited complaints to management to fall within its scope. Section B considers the importance the Supreme Court has attached to congressional purpose and intent in interpreting other antiretaliation statutes. It argues that the Supreme Court could use a similar approach to interpret section 510 broadly. Section C demonstrates that a broad interpretation of section 510's scope is faithful to Congress's intent in passing ERISA and furthers ERISA's remedial purpose.

A. *Textual Analysis of Section 510*

In a traditional statutory analysis, courts "look first to the statutory language" and only consider extrinsic factors if the statutory language is unclear.¹⁵⁶ This section does just that. It analyzes the plain text of section 510 to demonstrate two points: (1) it is plausible to read section 510 as encompassing unsolicited, informal complaints to management about potential ERISA violations; and (2) the plain text of section 510 is susceptible to multiple interpretations, which allows courts to properly consider extrinsic factors to determine the provision's scope.¹⁵⁷

¹⁵⁶ *Blum v. Stenson*, 465 U.S. 886, 896 (1984).

¹⁵⁷ *Cf. id.* at 896–97 (examining the legislative history of a statute to determine its appropriate meaning because the statutory text was unclear). *See generally* HANKS ET AL., *supra* note 73, at 300–32 (providing numerous examples of courts that have considered extrinsic sources to determine a statute's meaning when the plain text of the statute is susceptible to multiple interpretations).

Section 510 states in relevant part, “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.”¹⁵⁸ Broadly, section 510 can be divided into three distinct parts. The first part defines the activities an employer is prohibited from taking against an employee who falls within the scope of the provision. The plain text of the second part of the provision protects only employees who engage in three types of activities: (1) giving information, (2) testifying, and (3) preparing to testify. Clearly, the latter two of these activities are not relevant to whether an employee who makes an informal, unsolicited complaint to management falls within the scope of the statute’s protection. It seems equally as clear, however, that an employee who makes an informal, unsolicited complaint to management has given information concerning a violation of ERISA. Thus, no language in the second part of section 510 prevents unsolicited, informal complaints to management from falling within the provision’s scope.

As to the third part of section 510, “in any inquiry or proceeding relating to this chapter,” there are two possible interpretations. Based on the text alone, it seems clear that the third part of the provision qualifies at least some of the provision’s second part. However, the extent to which the third part qualifies the second part is ambiguous. One plausible reading of the statutory text is that the third part qualifies the context in which all three types of activities protected by the second part must occur to be protected. That is, an employee is only protected if she gives information, testifies, or prepares to testify in one of two specific contexts: (1) “any inquiry” or (2) a “proceeding.” Under this interpretation, if the employee gives information outside the context of “any inquiry” or a “proceeding,” the employee’s activity is outside the scope of section 510 and is not protected.¹⁵⁹

A second interpretation of this part of the provision’s text is also plausible, however. It is conceivable from a plain reading of the provision’s text that “any inquiry” and “proceeding” only qualify the context in which the actions of testifying or preparing to testify must occur, but do not qualify the context in

¹⁵⁸ 29 U.S.C. § 1140 (2006).

¹⁵⁹ Other antidiscrimination-in-employment statutes have antiretaliation provisions that on their face define their scope much more broadly. For example, Title VII’s antiretaliation provision protects any employee who “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 any investigation, proceeding, or hearing under this subchapter.” Civil Rights Act of 1964 § 704(a), 42 U.S.C. § 2000e-3(a).

which the action of giving information must occur to be protected. Under this interpretation, section 510 operates as follows: an employee participates in a protected activity if she (1) gives information concerning a potential ERISA violation or (2) testifies or prepares to testify in “any inquiry” or “proceeding” concerning a potential ERISA violation. This interpretation of the provision is faithful to the provision’s text. That is, section 510 makes sense grammatically even if the phrase “or has testified or is about it testify in any inquiry or proceeding” is eliminated. Without this phrase, the provision reads, “It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information . . . relating to this chapter.”¹⁶⁰ Accordingly, it is plausible to read the statute’s plain text to conclude that employees who give information about ERISA violations are protected, even if the action of giving information does not occur within the context of “any inquiry” or “proceeding.”

Assuming, however, for purposes of argument, that Congress intended to limit the scope of section 510 by protecting only employees who give information within the context of “any inquiry” or “proceeding,” such an interpretation does not foreclose the possibility that informal, unsolicited complaints to management concerning ERISA violations fall within the provision’s scope and are protected activities. The language “any inquiry or proceeding,” when interpreted in light of the provision’s purposes, is broad enough to encompass informal, unsolicited complaints to management.

To begin with, it is clear that informal, unsolicited complaints to management are not “proceedings” and do not fall within the scope of section 510 on that basis, because the word “proceeding” suggests a level of formality that is not present in the context of an informal complaint to management.¹⁶¹ Yet the text does not limit the scope of section 510’s antiretaliation provision only to “proceedings,” in spite of the fact that the Fourth Circuit in *King* seems to consider an “inquiry” and a “proceeding” as one and the same.¹⁶² Thus, as every circuit court of appeals other than the Fourth Circuit seems to recognize, complaints that occur in less formal settings could fall within the “inquiry” mentioned in section 510.

¹⁶⁰ 29 U.S.C. § 1140.

¹⁶¹ *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 223 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 1604 (2011).

¹⁶² *See supra* note 147 and accompanying text.

By the statute's plain text, complaints about ERISA violations may be protected if they occur within the context of "*any inquiry*."¹⁶³ Whether unsolicited, informal complaints to management fall within the provision's scope under this interpretation of the statute, therefore, depends on whether such complaints fall within the definition of "*any inquiry*." The statute does not define the term "*inquiry*." When a statute does not define a key word, courts will interpret the statute in light of the word's "ordinary, contemporary, common meaning."¹⁶⁴ *Webster's Dictionary* gives two possible definitions of the word "*inquiry*": (1) "the act or an instance of seeking truth, information, or knowledge about something[;] examination into facts or principles," and (2) "the act or an instance of asking for information[;] a request for information."¹⁶⁵ The synonym guide beneath these definitions indicates the term's common usage: "[*Inquiry*] is a general term applicable to any quest for truth, knowledge, or information."¹⁶⁶

The statute's use of the word "*any*" to describe which types of inquiries the provision protects is also significant. "*Any*" is commonly defined as "one or some indiscriminately of whatever kind."¹⁶⁷ The use of the term "*any*" indicates that Congress intended the scope of the provision to be inclusive, rather than exclusive. That is, Congress intended protected activities to be defined broadly, as opposed to narrowly.¹⁶⁸ Had Congress intended to define the scope of protected activities more narrowly, Congress could have used the term "*an inquiry*," as opposed to the broader statutory language Congress chose to use, "*any inquiry*."¹⁶⁹

An informal, unsolicited complaint to management could conceivably fall within the common usage of the term "*any inquiry*." As *Webster's* explains, "*inquiry*" is commonly used as a general term that refers to a whole host of information-seeking activities. Nothing in the common usage of the word "*inquiry*" requires that the activity have a certain level of formality to be considered an "*inquiry*." Similarly, nothing in the common usage of the word

¹⁶³ 29 U.S.C. § 1140 (emphasis added).

¹⁶⁴ *Perrin v. United States*, 444 U.S. 37, 42 (1979).

¹⁶⁵ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 1167 (1986).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 97.

¹⁶⁸ *Cf. Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1332 (2011) (reasoning that the use of the word "*any*" to qualify the noun "*complaint*" in the FLSA's antiretaliation provision supports a broad construction of what types of activities are protected activities for the purpose of the antiretaliation statute).

¹⁶⁹ Employee Retirement Income Security Act of 1974 § 510, 29 U.S.C. § 1140 (2006) (emphasis added).

“inquiry” suggests that an “inquiry” is defined by who initiates it. Accordingly, the fact that the sharing of information is unsolicited does not suggest that it cannot be considered an “inquiry.” Perhaps the closest case of whether an informal, unsolicited complaint to management could fall within the common meaning of “any inquiry” is when an employee merely reports to management a potential ERISA violation, perhaps by e-mail, without expecting a response. Yet in light of the broad common meaning of “inquiry,” the statute’s use of the word “any,” and Congress’s intent in passing ERISA and including section 510, such a scenario could potentially be construed as “any inquiry” and would therefore be considered a protected activity. That is, it would make sense for an employee who reported a potential ERISA violation to management to say, “I *inquired* with my manager about a potential violation of federal law.”

B. Statutory Interpretation in the Retaliation Context

Even if section 510 were not susceptible to multiple interpretations, Congress’s intent and the statute’s legislative history would not be irrelevant. This is particularly true in the context of antiretaliation provisions of other antidiscrimination-in-employment statutes. This section draws on decisions from the Supreme Court and other appellate courts from various areas of retaliation law to demonstrate a judicial willingness to broadly construe antiretaliation statutes to further congressional purpose and intent.

In *Crawford v. Metropolitan Government*, the Supreme Court, interpreting the opposition clause of Title VII’s antiretaliation provision, discussed not only the plain meaning of the word “oppose” but also the policy reasons justifying a broad construction of the provision’s scope.¹⁷⁰ In *CBOCS West, Inc. v. Humphries*, the Supreme Court went even further, holding that § 1981, which broadly prohibits racial discrimination in contractual relationships, including employment,¹⁷¹ creates a cause of action for employees who are fired in retaliation for complaining to management about racial discrimination, in spite of the fact that § 1981’s text does not contain an antiretaliation provision at all.¹⁷² In so holding, the Court relied heavily on the 1969 case, *Sullivan v. Little*

¹⁷⁰ 129 S. Ct. 846, 851–53 (2009). The Supreme Court subsequently held in a unanimous decision that Title VII’s antiretaliation provision is broad enough to protect individuals who are closely related to an employee who files an EEOC charge, as long as both individuals work for the same company, even though the text of Title VII’s antiretaliation provision does not explicitly create a cause of action for these third-party retaliation claims. *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 868, 870 (2011).

¹⁷¹ 42 U.S.C. § 1981.

¹⁷² 128 S. Ct. 1951, 1954–55 (2008).

Hunting Park, Inc.,¹⁷³ which relied largely on legislative history to conclude that § 1981's "sister statute,"¹⁷⁴ § 1982,¹⁷⁵ creates a cause of action for retaliation.¹⁷⁶ In *Jackson v. Birmingham Board of Education*, the Supreme Court, relying on *Sullivan*, held that Title IX of the Civil Rights Act of 1964, which prohibits discrimination in education on the basis of sex, encompasses retaliation claims, even though the statute's text does not explicitly prohibit retaliation.¹⁷⁷ In so holding, the Court relied heavily on Congress's intent in passing Title IX, stating, "Congress enacted Title IX not only to prevent the use of federal dollars to support discriminatory practices, but also 'to provide individual citizens effective protection against those practices.'"¹⁷⁸ The Court went on to explain, "Reporting incidents of discrimination is integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished. Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel."¹⁷⁹

The U.S. Supreme Court has also applied a broad construction of antiretaliation provisions outside the context of race and sex discrimination. For example, in *NLRB v. Scrivener*, the Court held that the antiretaliation provision of the National Labor Relations Act protects employees who give written sworn statements to investigators,¹⁸⁰ even though the provision's text on its face protects only employees who are "discharge[d] or otherwise discriminate[d] against . . . because [they have] filed charges or given testimony."¹⁸¹ In reaching its conclusion, the Court stated, "The [provision's] reference . . . to an employee who 'has filed charges or given testimony,' could be read strictly and confined in its reach to formal charges and formal testimony. It can also be read more broadly."¹⁸² To determine whether to broadly or narrowly construe the statute, the Court relied on congressional intent and the statute's purpose: "Construing [the provision] to protect the

¹⁷³ 396 U.S. 229 (1969).

¹⁷⁴ *CBOCS West*, 128 S. Ct. at 1956.

¹⁷⁵ 42 U.S.C. § 1982. Section 1982 prohibits racial discrimination in connection with the ownership, purchase, or sale of real property. *Id.*

¹⁷⁶ *Sullivan*, 396 U.S. at 237; *see also* *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 176 (2005) ("[I]n *Sullivan* we interpreted a general prohibition on racial discrimination to cover retaliation against those who advocate the rights of groups protected by that prohibition.").

¹⁷⁷ *Jackson*, 544 U.S. at 178.

¹⁷⁸ *Id.* at 180 (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979)).

¹⁷⁹ *Id.*

¹⁸⁰ 405 U.S. 117, 121 (1972).

¹⁸¹ National Labor Relations Act § 8(4), 29 U.S.C. § 158(a)(4) (2006).

¹⁸² *Scrivener*, 405 U.S. at 122 (quoting 29 U.S.C. § 158(a)(4)).

employee during the investigative stages, as well as in connection with the filing of a formal charge or the giving of formal testimony, comports with [its] objective.”¹⁸³

In a more recent case, the Supreme Court took a similar approach. In *Kasten v. Saint-Gobain Performance Plastics Corp.*, the Court held that the antiretaliation provision of the FLSA was broad enough to protect employees who make oral as well as written complaints, even though the provision’s text does not expressly protect employees who make oral complaints.¹⁸⁴ In so holding, the Court demonstrated a willingness to look beyond the plain text of the provision. The Court reasoned that “dictionary meanings, even if considered alone, do not *necessarily* limit the scope of the statutory [language].”¹⁸⁵ The task of the judiciary in interpreting an antiretaliation statute is to “look[] for the ‘limits’ of a linguistic phrase rather than what ‘exemplif[ies]’ its application.”¹⁸⁶ In other words, the “enforcement needs” of antiretaliation statutes “argue for an interpretation [of the statutory text] that . . . provide[s] ‘broad rather than narrow protection to the employee.’”¹⁸⁷

These types of cases illustrate that an “inquiry” into congressional intent and purpose are very informative for courts that are interpreting what types of retaliation claims are cognizable under various federal antidiscrimination-in-employment statutes. Supreme Court precedent does not blindly adhere to a narrow reading of the text of such statutes, particularly when that text is susceptible to multiple interpretations. In line with these precedents, the term “inquiry” in section 510 should be interpreted with an eye toward the purposes of ERISA and Congress’s intent. In particular, section 510 should be understood in terms of its relation to the entire administrative regulatory scheme that Congress intended in implementing ERISA.

¹⁸³ *Id.* at 121.

¹⁸⁴ 131 S. Ct. 1325, 1335 (2011) (construing Fair Labor Standards Act of 1938 § 15(a)(3), 29 U.S.C. §§ 215(a)(3)). The antiretaliation provision of the FLSA states:

[I]t shall be unlawful for any person . . . to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. § 215(a)(3).

¹⁸⁵ *Kasten*, 131 S. Ct. at 1331.

¹⁸⁶ *Id.* (second alteration in original) (quoting *Crawford v. Metro. Gov’t*, 129 S. Ct. 846, 851 (2009)).

¹⁸⁷ *Id.* at 1334 (quoting *Scrivener*, 405 U.S. at 122).

C. *Staying True to Congressional Intent*

Section B illustrated how congressional intent can inform judicial interpretations of antiretaliation statutes. This section specifically considers Congress's intent in passing ERISA. It argues that the legislative history supports a broad construction of section 510.

Undeniably, one of the results of Congress's implementation of ERISA is the creation of a complex and comprehensive federal regulatory scheme with regard to pensions and other employee benefit plans.¹⁸⁸ Underlying this complex system is Congress's intent "to assure American workers that they may look forward with anticipation to a retirement with financial security and dignity, and without fear that this period of life will be lacking in the necessities to sustain them as human beings within our society."¹⁸⁹

Congress passed ERISA primarily due to perceived shortcomings in the then-existing federal laws regulating pensions and other types of employee benefit plans, in particular the Welfare and Pension Plans Disclosure Act of 1958.¹⁹⁰ Specifically, the Welfare and Pension Plans Disclosure Act of 1958 mandated only limited disclosure of information concerning pension and other employee benefit plans and lacked fiduciary standards for plan administrators.¹⁹¹ In addition, the Welfare and Pension Plans Disclosure Act of 1958 was inadequate in that it relied solely "upon the initiative of the individual employee to police the management of his plan."¹⁹² As the Senate Report concerning the passage of ERISA noted, under the then-existing system, "[i]n almost every instance, participants los[t] their benefits not because of some violation of federal law, but rather because of the manner in which the plan [wa]s executed with respect to its contractual requirements of vesting or funding."¹⁹³ In fact, under the Welfare and Pension Plans Disclosure Act of 1958, it was common for plan administrators to manage large sums of money with little or no oversight, which "created a temptation for self-dealing and improper handling of . . . funds" intended to provide for retirement income

¹⁸⁸ See *supra* note 16 and accompanying text.

¹⁸⁹ S. REP. NO. 93-127, at 13 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4849.

¹⁹⁰ See H.R. REP. NO. 93-533, at 1 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4639; S. REP. NO. 93-127, at 3.

¹⁹¹ H.R. REP. NO. 93-533, at 4.

¹⁹² *Id.*

¹⁹³ S. REP. NO. 93-127, at 5.

for employees.¹⁹⁴ Before ERISA, mismanagement of employee benefit plans was rampant and workers were often denied the retirement benefits they had rightfully accrued over a lifetime of hard work.¹⁹⁵

In addition to tightening federal regulation of pension and other employee benefit plans to prevent abuses and mismanagement by plan administrators, Congress also intended that ERISA would open the door to the courts for individual employees to enforce their rights under federal law.¹⁹⁶ As a result, ERISA contained several important enforcement provisions that were “designed specifically to provide . . . participants and beneficiaries with broad remedies for redressing or preventing violations of [ERISA].”¹⁹⁷ These provisions include section 502(a), which creates a civil action for individuals to enforce the substantive provisions of ERISA,¹⁹⁸ and section 510, which “proscribes interference with rights protected by ERISA.”¹⁹⁹ The Senate Report explains in broad terms the importance of these enforcement provisions with respect to the overall legislative scheme Congress intended by implementing ERISA:

The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities . . . or recovery of benefits due to participants.²⁰⁰

The Supreme Court has subsequently interpreted ERISA’s enforcement provisions broadly and as an indispensable part of ERISA’s legislative scheme, describing them simultaneously as “a comprehensive civil enforcement scheme”²⁰¹ and as “one of the essential tools for accomplishing the stated purposes of ERISA.”²⁰²

The legislative history specific to section 510 is also indicative of the importance that Congress intended to attach to that particular provision. During

¹⁹⁴ Carlton R. Sickles, *Introduction: The Significance and Complexity of ERISA*, 17 WM. & MARY L. REV. 205, 206 (1975).

¹⁹⁵ S. REP. NO. 93-127, at 5.

¹⁹⁶ *Id.* at 35.

¹⁹⁷ *Id.*

¹⁹⁸ 29 U.S.C. § 1132(a) (2006).

¹⁹⁹ *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990) (discussing 29 U.S.C. § 1140).

²⁰⁰ S. REP. NO. 93-127, at 35.

²⁰¹ *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987).

²⁰² *Id.* at 52.

floor debates on ERISA, Senator Javits, one of the bill's primary sponsors, indicated that section 510 was an "extraordinary reform" that was intended to "provide a remedy for any person fired [for exercising her rights under ERISA] such as is provided for a person discriminated against because of race or sex, for example."²⁰³ When pressed about the effect of section 510, Senator Javits reiterated, "This gives the employee the same right" as an employee unlawfully terminated on the basis of race or sex in violation of Title VII.²⁰⁴ As this Comment has noted, the Supreme Court has taken a broad approach to interpreting antiretaliation provisions in statutes that protect against race and sex discrimination.²⁰⁵ Senator Javits's statement indicates that Congress intended a similarly broad protection against retaliation in the context of ERISA.

The Senate Report also supports the fact that Congress considered section 510 as extremely important to the legislative scheme Congress enacted by passing ERISA.²⁰⁶ It describes why section 510²⁰⁷ and section 511²⁰⁸ were included as follows:

These provisions were added by the Committee in the face of evidence that in some plans a worker's pension rights or the expectations of those rights were interfered with by the use of economic sanctions or violent reprisals. Although the instances of these occurrences are relatively small in number, the Committee has concluded that safeguards are required to preclude this type of abuse from being carried out and in order to completely secure the rights

²⁰³ 119 CONG. REC. 30,044 (1973) (statement of Sen. Jacob Javits).

²⁰⁴ *Id.* (statement of Sen. Jacob Javits).

²⁰⁵ *See supra* Part III.B.

²⁰⁶ *See* S. REP. NO. 93-127, at 35–36 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4871–72.

²⁰⁷ 29 U.S.C. § 1140 (2006).

²⁰⁸ *Id.* § 1141. Section 511 is similar in effect to section 510 in that both provisions create a deterrent to the interference with rights protected by ERISA. Whereas section 510 deters individuals from interfering with protected rights by imposing civil penalties, *see id.* § 1140, section 511 deters individuals from interfering with protected rights by imposing criminal penalties, *see id.* § 1141. Section 511 states:

It shall be unlawful for any person through the use of fraud, force, violence, or threat of the use of force or violence, to restrain, coerce, intimidate, or attempt to restrain, coerce, or intimidate any participant or beneficiary for the purpose of interfering with or preventing the exercise of any right to which he is or may become entitled under the plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act. Any person who willfully violates this section shall be fined \$100,000 or imprisoned for not more than 10 years, or both.

Id. (citation omitted).

and expectations brought into being by this landmark reform legislation.²⁰⁹

This language indicates that Congress intended these enforcement provisions to be interpreted in a way that most completely “secure[s] the rights and expectations brought into being by [ERISA].”²¹⁰ The Supreme Court has also noted the importance Congress attached to section 510 when it implemented ERISA, stating, “Congress viewed . . . section [510] as a crucial part of ERISA because, without it, employers would be able to circumvent the provision of promised benefits.”²¹¹

Narrow interpretations of the scope of ERISA’s enforcement provisions, including section 510, are inadequate to accomplish this objective.²¹² Unlike Title VII, which has the purpose of eliminating long-standing barriers to employees’ advancement because of deeply ingrained societal discrimination on the basis of race and gender, one of ERISA’s purposes is to prohibit employers from taking certain actions that their monetary self-interest would dictate that they take.²¹³ That is, although a manager might discriminate against an employee on the basis of her race or gender because of the manager’s bias, a manager typically violates section 510 because there is a strong economic incentive to do so.²¹⁴ Accordingly, while society over time has begun to change its attitudes toward women and racial minorities in the workplace, managers continue to face increased pressure to maximize profits and decrease costs.²¹⁵ And although societal norms have changed in a way as to greatly disfavor discrimination because of race or gender, and in turn create a disincentive to discriminate on the basis of race or gender, the economic incentive to interfere with employees who attempt to exercise their rights under ERISA remains strong. In light of this strong economic incentive, a narrow construction of ERISA’s enforcement provisions will fail to protect the rights of employees created by ERISA because managers will not fear getting caught. As a result, a broad judicial construction of ERISA’s enforcement provisions

²⁰⁹ S. REP. NO. 93-127, at 36.

²¹⁰ *Id.*

²¹¹ *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 143 (1990).

²¹² See Dana M. Muir, *ERISA Remedies: Chimera or Congressional Compromise?*, 81 IOWA L. REV. 1, 53 (1995) (suggesting that ERISA’s enforcement provisions have been interpreted narrowly, which has resulted in a “fail[ure] to provide adequate deterrence against wrongdoing”).

²¹³ *Id.* at 50–51.

²¹⁴ *Id.*

²¹⁵ *Id.* at 51.

(and the remedies available to plaintiffs who prevail) is necessary to accomplish Congress's purpose in implementing ERISA.²¹⁶

There is ample legislative history that suggests that Congress intended the "landmark reform legislation"²¹⁷ of ERISA to be broadly construed to achieve Congress's overarching purpose of ensuring that workers enter retirement with financial security.²¹⁸ The Senate Report on ERISA makes this point clear. It states, "It is intended that coverage under the Act be *construed liberally to provide the maximum degree of protection* to working men and women covered by private retirement programs. Conversely, exemptions should be confined to their narrow purpose."²¹⁹ With specific regard to ERISA's enforcement provisions, including section 510, the Senate Report also makes it clear Congress intended them to be broadly construed. The report notes, "The enforcement provisions have been designed specifically to provide both the Secretary [of Labor] and participants and beneficiaries with broad remedies for redressing or preventing violations."²²⁰

In spite of this language indicating that ERISA's enforcement provisions were intended to be broadly construed, the legislative history of ERISA also acknowledges that Congress did not intend to impose an undue hardship on employers or to discourage employers from providing benefit plans to their employees. Specifically, the Senate Report indicates that, while Congress did intend to provide additional security for workers' retirement savings, Congress did not intend to do so by imposing rigid requirements on employers. Rather, Congress intended to "strike a[] . . . balance between the interests of employers and labor organizations in maintaining flexibility in the design and operation of their pension programs, and the need of the workers for a level of protection which will adequately protect their rights and just expectations."²²¹

In light of this legislative history, then, two important points of interpretation become apparent. First, ambiguous provisions of ERISA should be interpreted in such a way that they further ERISA's overarching purpose of protecting workers from the mismanagement and misuse of the funds they have saved for retirement. Second, the interests of employers are also relevant.

²¹⁶ See *id.* at 53.

²¹⁷ S. REP. NO. 93-127, at 35 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4872.

²¹⁸ *Id.* at 13.

²¹⁹ *Id.* at 18 (emphasis added).

²²⁰ *Id.* at 35.

²²¹ *Id.* at 13.

Where possible, ambiguous provisions should also be interpreted in a way that gives employers maximum flexibility and minimizes the burden imposed on them.

Applying these principles to section 510, it is apparent that Congress intended section 510's scope to be broad. A broad interpretation of section 510, particularly the phrase "any inquiry," best furthers Congress's purpose of protecting workers. Interpreting "any inquiry" broadly results in an expansive class of activities that qualify as protected activities, which means more employees who report potential ERISA violations have recourse under federal law if they face an adverse employment action for making such a report. This in turn removes a disincentive for employees to report such violations, which makes it more likely that such violations come to light and are corrected, better accomplishing Congress's goal of protecting workers' retirement savings from misuse and mismanagement by pension plan administrators.

A broad interpretation of the phrase "any inquiry" also furthers Congress's intent to strike a balance between protecting workers' benefits and minimizing the burden imposed on the employer. If "any inquiry" is interpreted to include informal, unsolicited complaints to management, then employees who are concerned about potential ERISA violations can simply report their concerns to management without fear of retaliation. Management can then decide whether ERISA violations are actually occurring and can take action to correct any violations it discovers. However, if "any inquiry" were interpreted more narrowly, employees would be less likely to report potential ERISA violations to management for fear of retaliation. For example, under the Fourth Circuit's interpretation, an employee's complaint must occur within the context of a judicial or administrative hearing to be considered a protected activity.²²² Employees who discover potential ERISA violations under this type of interpretation would only have two options to avoid potential retaliation: (1) ignore the potential ERISA violations and do nothing, which hinders Congress's purpose in passing ERISA; or (2) file a lawsuit or otherwise report the potential ERISA violations in the context of a judicial or administrative "proceeding," which exposes the employer to litigation, creates bad publicity for the employer, and obstructs Congress's intent of minimizing the burden ERISA imposes on employers.

²²² See *King v. Marriott Int'l, Inc.*, 337 F.3d 421, 427 (4th Cir. 2003).

This Part has demonstrated that, from a statutory-interpretation perspective, the advantages of interpreting section 510 to encompass informal, unsolicited complaints to management are threefold. First, such an interpretation remains faithful to the provision's plain text.²²³ Second, such an interpretation is consistent with recent Supreme Court retaliation jurisprudence.²²⁴ Finally, a broad interpretation of section 510's scope furthers Congress's twin aims in passing ERISA: (1) providing greater financial security for workers' retirement savings, and (2) promoting flexibility in the way employee benefit plans are administered and minimizing the burden imposed on employers.²²⁵ Thus, under both a textual and a purposive interpretation of the statute, the conclusion is the same: properly construed, section 510 is broad enough in scope to encompass unsolicited, informal complaints to management, and employees who make such complaints and face adverse employment actions in retaliation for doing so have a federal cause of action.

IV. PRACTICAL ADVANTAGES OF A BROAD INTERPRETATION OF SECTION 510

Part III concluded that interpreting section 510 to encompass informal, unsolicited complaints to management is superior from a statutory-interpretation standpoint. This Part argues that an interpretation of section 510 that includes these types of complaints is also superior from a practical, policy-oriented perspective. Section A argues that state law is inadequate to protect workers who report violations of ERISA to their supervisors. Section B discusses the implications of a broad construction of section 510 in terms of ERISA's broad preemption of state laws. Section C concludes by demonstrating that a broad construction of section 510 reverses the perversion of incentives that exists under current law by encouraging employees to report potential ERISA violations to their supervisors.

A. *Inadequacy of State Law*

A broad interpretation of section 510 means that employees who face an adverse employment action because they report potential ERISA violations to their supervisors can vindicate their rights in federal court. The fact that employees in this situation can sue in federal court is significant in light of the varied patchwork of state laws that may or may not give them a state law cause

²²³ See *supra* Part III.A.

²²⁴ See *supra* Part III.B.

²²⁵ See *supra* Part III.C.

of action. As of 2008, only seventeen states had statutes that specifically protected private-sector employees from retaliation outside the context of state fair-employment-practices statutes.²²⁶ These statutes, however, vary substantially in terms of how they define what constitutes a protected activity.²²⁷ Even if such an employee were in a state that had an antiretaliation statute, it is very possible that reporting an ERISA violation would not fall within the scope of the state statute, and therefore the employee may be left unprotected from retaliation by state law.²²⁸

Even in states that do not have laws protecting private-sector employees from retaliation for engaging in whistle-blower activities, state tort law may provide a remedy for some employees who face an adverse employment action because they report potential ERISA violations to management. As of 2008, at least forty states permitted whistle-blowers to bring tort actions for wrongful termination in violation of public policy against their employers.²²⁹ Like state statutes protecting employees from retaliation, state tort law in this area also varies widely from jurisdiction to jurisdiction.²³⁰ In particular, state tort law varies with regard to whether an employee who reports a violation of federal law (as opposed to a violation of state law) can pursue a state law cause of action for wrongful termination in violation of public policy.²³¹ For example, some state courts have held that federal law is not a source of the state's public policy and cannot serve as the basis for a claim of wrongful termination in

²²⁶ Richard Moberly, *Protecting Whistleblowers by Contract*, 79 U. COLO. L. REV. 975, 983 & n.34 (2008). State fair-employment-practices statutes tend to be similar in terms of the scope of their protection to Title VII and thus are typically limited to claims of discrimination on the basis of race, sex, religion, and national origin. *See id.* at 983 n.34. In addition, some state fair-employment-practices statutes protect employees from discrimination based on broader characteristics, such as family status, sexual orientation, and disability, but fair-employment-practices statutes are not broad enough to encompass retaliation claims by ERISA whistle-blowers. *See, e.g.*, N.J. STAT. ANN. § 10:5-4 (West 2004) (“All persons shall have the opportunity to obtain employment . . . without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, sex or source of lawful income used for rental or mortgage payments, subject only to conditions and limitations applicable alike to all persons.”).

²²⁷ Moberly, *supra* note 226, at 983.

²²⁸ *Id.* For example, the Arizona Employment Protection Act prohibits employers from terminating employees in retaliation for reporting violations of state law, but not of federal law. ARIZ. REV. STAT. ANN. § 23-1501 (Supp. 2010). By contrast, Connecticut law expressly prohibits employers from terminating employees in retaliation for reporting violations of federal law as well as state law. CONN. GEN. STAT. § 31-51m(b) (2010); *see also* Moberly, *supra* note 226, at 983.

²²⁹ Moberly, *supra* note 226, at 983.

²³⁰ *Id.* at 984.

²³¹ *Id.*

violation of public policy.²³² Under this type of analysis, reporting a violation of ERISA to management would not give an employee a state law tort claim for wrongful termination in violation of public policy.²³³ In addition, some state courts have distinguished between internal complaints about violations of law and external complaints about violations of law.²³⁴ These courts have reasoned that whistle-blowers who make internal complaints have no cause of action for wrongful termination in violation of public policy, because “reporting misconduct internally does not sufficiently advance the public interest.”²³⁵ In jurisdictions that have adopted either of these doctrines, employees who make informal, unsolicited complaints to management concerning potential ERISA violations would not have a cause of action under state tort law.

The case of Shirley Edwards, described in the Introduction of this Comment, illustrates the potential importance of a broad interpretation of section 510 in light of state laws that may inadequately protect employees who make unsolicited complaints to management about potential ERISA violations. After the Third Circuit affirmed the district court’s dismissal of Edwards’s claim under section 510, Edwards’s only alternative would be to sue in state court under Pennsylvania law. Unfortunately for Edwards, Pennsylvania’s whistle-blower statute only applies to public-sector employees.²³⁶ Pennsylvania tort law also does not provide Edwards a cause of action for wrongful termination under these circumstances. Although Pennsylvania common law recognizes a tort claim for wrongful discharge in violation of public policy,²³⁷ Pennsylvania law presupposes an “extremely strong” presumption of at-will employment, allowing wrongful discharge claims in only “the most limited of circumstances.”²³⁸ As a general matter, Pennsylvania law does not recognize a claim for wrongful termination in violation of public policy when an employee is terminated in retaliation for reporting a violation

²³² *Id.*

²³³ *See id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ 43 PA. CONS. STAT. § 1422 (2010). The Pennsylvania Whistleblower Law defines an “employee” as “[a] person who performs a service for wages or other remuneration under a contract of hire, written or oral, express or implied, for a public body.” *Id.* (emphasis added). The definition of “public body” excludes private-sector companies that do not receive government funding. *Id.* Accordingly, the Pennsylvania Whistleblower Law does not protect Edwards because she is not considered an employee within the meaning of the statute.

²³⁷ *See* Geary v. U.S. Steel Corp., 319 A.2d 174, 180 (Pa. 1974).

²³⁸ *McLaughlin v. Gastrointestinal Specialists, Inc.*, 750 A.2d 283, 287 (Pa. 2000).

of a *federal* statute.²³⁹ That is, an employee only has a claim for wrongful discharge in violation of public policy under Pennsylvania law if the employee's termination violates a public policy of Pennsylvania, as embodied in the Pennsylvania constitution, state statutes, and decisions of Pennsylvania state courts.²⁴⁰ Under the current law, then, Shirley Edwards is out of a job and without a remedy under either state or federal law.²⁴¹ And Edwards's employer (and supervisor) escapes unscathed.

B. Implications of Preemption of State Law

The interpretation this Comment proposes has another consequence with regard to state law in light of ERISA's broad preemption of state laws. Section 514(a) states that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" subject to regulation under ERISA.²⁴² The Supreme Court has interpreted section 514(a) as very expansive, stating in one decision that it "is conspicuous for its breadth."²⁴³ Within the specific context of section 510, the Supreme Court has also interpreted the preemptive effect of ERISA very broadly, holding that, "[w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected' by § 510 . . . 'due regard for the federal enactment requires that state jurisdiction must yield.'"²⁴⁴ It comes as no surprise, therefore, that every circuit court of appeals concluding that informal, unsolicited complaints to management fall within the scope of section 510 has

²³⁹ See *id.* at 289 ("[T]o set forth a claim for wrongful discharge a Plaintiff must do more than show a possible violation of a federal statute that implicates only her own personal interest.").

²⁴⁰ *Id.*

²⁴¹ The Supreme Court of Pennsylvania has arguably left the door open to allowing a state tort law claim for wrongful discharge in violation of public policy even when the public policy is embodied in a federal statute if the federal courts do not provide an adequate forum for vindicating the employee's rights. See *id.* at 290 (suggesting that whether "the federal scheme provides for an administrative forum" may be a relevant factor in the analysis); see also *Carlson v. Cmty. Ambulance Servs., Inc.*, 824 A.2d 1228, 1233 (Pa. Super. Ct. 2003) (noting that the federal statute did not "permanently foreclose[] litigation" in affirming summary judgment in favor of the employer). But see *Weaver v. Harpster*, 975 A.2d 555, 569 (Pa. 2009) (holding that a state or federal statute that provides a remedy for wrongful termination only in limited circumstances cannot provide a basis for a tort claim for wrongful discharge against public policy when the statute itself does not apply). The Pennsylvania courts have not considered the specific question of whether section 510, in light of the Third Circuit's decision in *Edwards*, could provide the basis for a state law claim of wrongful discharge in violation of public policy. Whether such a claim is cognizable is unclear. It is very possible (perhaps likely) that Edwards would have no state law remedy.

²⁴² 29 U.S.C. § 1144(a) (2006).

²⁴³ *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990).

²⁴⁴ *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 145 (1990) (first alteration in original) (quoting *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 409 n.8 (1988)).

also concluded that section 510 preempts any state law remedy for retaliation, whether that remedy arises under a state statute or under state tort law.²⁴⁵ Thus, although the interpretation this Comment proposes succeeds in opening the door to the federal courthouse to some employees who otherwise would have no remedy under either federal or state law, it has the additional effect of closing the door to the state courts for other employees who currently would have causes of action under state (but not federal) law.

This shift from state law claims to federal law claims may have some important implications with regard to the range of remedies available to a plaintiff who prevails on her cause of action under section 510. The remedies provision of section 502(a)(3) allows a participant, beneficiary, or fiduciary of a benefit plan covered by ERISA who prevails on a claim under section 510 to obtain two types of relief: (1) an injunction preventing future violations of ERISA or the terms of the plan and (2) “other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.”²⁴⁶ The Supreme Court has interpreted this provision to permit plaintiffs who prevail on a cause of action under section 510 to recover only “those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages).”²⁴⁷ Consequently, to the extent that state law may allow plaintiffs who prevail on a state law retaliation claim to recover compensatory damages, the potential recovery for plaintiffs may be less under the interpretation of section 510 this Comment proposes (as opposed to interpreting section 510 in such a way that informal, unsolicited complaints to management about potential ERISA violations fall outside its scope).²⁴⁸

More problematically for plaintiffs, however, is the fact that at least one circuit court of appeals has interpreted section 502(a)(3) as precluding plaintiffs who prevail on a cause of action under section 510 from recovering backpay.²⁴⁹ The court reasoned that backpay is legal relief akin to compensatory damages and therefore is precluded by the plain text of section

²⁴⁵ See, e.g., *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311, 1314 (5th Cir. 1994) (holding that ERISA section 510 preempts a state cause of action for wrongful discharge); *Hashimoto v. Bank of Haw.*, 999 F.2d 408, 412 (9th Cir. 1993) (holding that ERISA section 510 preempts the Hawaii Whistle Blower’s Act).

²⁴⁶ 29 U.S.C. § 1132(a)(3)(B).

²⁴⁷ *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993).

²⁴⁸ For example, the Delaware Whistleblowers’ Protection Act allows employees who prevail on retaliation claims to recover “actual damages” in addition to backpay and other equitable relief. DEL. CODE ANN. tit. 19, § 1704 (2010).

²⁴⁹ See *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246, 1260 (10th Cir. 2004).

502(a)(3).²⁵⁰ At least one commentator, however, has persuasively argued that this decision is inconsistent with the treatment of backpay under Title VII, the National Labor Relations Act, the Rehabilitation Act, and the FLSA, which universally treat backpay as an equitable remedy, not a legal remedy.²⁵¹ This commentator also convincingly argues that permitting backpay as a remedy better comports with congressional intent, and suggests that the case holding otherwise was incorrectly decided.²⁵² Whether backpay ultimately should be available as a remedy under section 502(a)(3), however, is beyond the scope of this Comment. Suffice it to say that it is an open question, and it is at least conceivable that the interpretation of section 510 this Comment proposes would make it impossible for some plaintiffs who prevail to recover backpay, even though state law may give them that remedy if section 510 were interpreted differently.²⁵³

C. *Reversing the Perversion of Incentives*

In spite of this preemption issue, under the current law, the fact remains that people like Shirley Edwards have no remedy under either federal or state law. This Comment's proposed interpretation of section 510 ensures that *all* employees who face adverse employment actions in retaliation for reporting potential ERISA violations to management will at least be able to sue for equitable relief and get an injunction giving them their jobs back if they prevail.²⁵⁴

While a narrow interpretation of section 510 may discourage employees from reporting potential ERISA violations to management and frustrate Congress's overarching objective of ensuring that workers' retirement savings are protected, a broad interpretation of section 510, such as the one proposed in this Comment, would open the doors of the federal courts to people like Edwards, who, under the existing law, have no remedy under either federal or state law. As a consequence, they would be more likely to report potential ERISA violations to their managers because they would be entitled to relief under federal law if their employers retaliated against them.

²⁵⁰ *Id.* at 1253.

²⁵¹ Barclay-Strobel, *supra* note 15, at 561–62.

²⁵² *Id.* at 567.

²⁵³ *See, e.g.*, tit. 19, § 1704 (expressly allowing backpay as a remedy).

²⁵⁴ *See supra* note 246.

In addition to opening the doors to the federal courthouses, this Comment's proposed interpretation of section 510 has the practical advantage of eliminating the perverse incentives for both employers²⁵⁵ and employees²⁵⁶ created by current judicial interpretations of section 510. This interpretation eliminates the incentive for employers not to investigate or follow-up on complaints initiated by employees because, unlike the approach the Second Circuit took in *Nicolaou*, it does not define whether an "inquiry" has occurred by reference to what types of actions the employer took in response to the employee's complaint.²⁵⁷ That is, an employee's informal, unsolicited complaint to management is still an "inquiry", even if the employer does not ask the employee any questions or further investigate the employee's complaint.²⁵⁸ If the employer then commits an adverse employment action against the complaining employee, the employer has violated section 510, even if the employer took no action to investigate the employee's complaint.²⁵⁹

Similarly, this Comment's proposed interpretation removes the incentive for employees to make their complaints only in the context of a judicial or administrative "proceeding." That is, under this Comment's proposed interpretation, an "inquiry" may occur even when the employee makes an informal, unsolicited complaint to management.²⁶⁰ The employee receives the same protection from an adverse employment action regardless of whether she makes an informal complaint to management or makes a complaint in the context of a more formal setting, such as a judicial or administrative "proceeding." This contrasts with the Fourth Circuit's interpretation in *King*, which requires that an employee make her complaint within the context of a judicial or administrative "proceeding" to have any recourse under federal law if her employer takes a retaliatory adverse employment action against her.²⁶¹

Under the Fourth Circuit's interpretation, an informed employee will only report potential ERISA violations within the context of a formal judicial or administrative "proceeding." By contrast, the broad interpretation developed by this Comment preserves an employee's cause of action for retaliation, even if she makes an unsolicited, informal complaint to management. Not only is an

²⁵⁵ See *supra* note 119 and accompanying text.

²⁵⁶ See *supra* note 153 and accompanying text.

²⁵⁷ See *supra* note 100 and accompanying text.

²⁵⁸ See *supra* Part III.A.

²⁵⁹ See *supra* Part III.

²⁶⁰ See *supra* Part III.

²⁶¹ See *supra* note 153 and accompanying text.

informal complaint to management less burdensome on the employee than instituting a lawsuit or a “proceeding” before an administrative agency, it also means more potential ERISA violations will be reported. In addition, businesses could potentially face fewer lawsuits and reduce their liability for ERISA violations, because they could promptly correct any actual ERISA violations employees’ complaints brought to light. Accordingly, this Comment’s interpretation of section 510 better accomplishes the twin aims Congress intended when it passed ERISA: maximizing the protection of workers’ retirement savings while minimizing the burden on employers.²⁶²

CONCLUSION

Current judicial interpretations of section 510 have been inadequate as a matter of statutory interpretation and from a policy perspective. Interpretations concluding that informal, unsolicited complaints to management fall outside the scope of section 510 have focused only on the text of the statute without considering congressional intent or purpose. Interpretations concluding that informal, unsolicited complaints to management are within the scope of section 510 have focused solely on congressional intent and purpose, and have ignored section 510’s plain text. This Comment proposes an interpretation of section 510 that bridges the gap between these two existing approaches. This interpretation is grounded in section 510’s plain text and also furthers Congress’s intent.

The interpretation this Comment proposes has several advantages over current judicial approaches. First, it eliminates perverse incentives that exist for both employers and employees under the current law and better accomplishes Congress’s twin aims in implementing ERISA of maximizing security of employees’ retirement savings while minimizing the burden imposed on employers. Second, it allows employees who have no cause of action under state law to pursue their claims in federal court, thereby ensuring that all employees who are fired in retaliation for making informal, unsolicited complaints to management concerning potential ERISA violations have an opportunity to vindicate their rights in court.

In the final analysis, a broad interpretation of section 510 has practical advantages for both employers and whistle-blower employees. Whistle-blower employees benefit because they can report any concerns that their employers

²⁶² See *supra* note 189 and accompanying text.

are violating ERISA directly to their managers without fear of losing their jobs and being left without a remedy. At the same time, employers benefit because employees will be more inclined to go directly to management with any questions about whether the employer's practices violate ERISA, minimizing the employer's exposure to costly litigation. Perhaps the biggest beneficiaries of a broad interpretation of section 510 are workers who have trusted their employers with their retirement savings. After all, section 510 "is the linchpin of the whole matrix of federal pension and welfare benefit protections."²⁶³ It is the foundation upon which the whole system designed to protect workers' retirement savings rests. The interpretation this Comment proposes strengthens this foundation. As a result, workers can rest assured they will not be denied the benefits they have accrued by a lifetime of hard work.

ADAM REINKE*

²⁶³ See *supra* note 33.

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