Employment Law—Third Circuit Denies ERISA Whistleblower Protection to Employee Discharged After Making Unsolicited Internal Complaint—*Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 1604 (2011)

The Employee Retirement Income Security Act (ERISA) established certain rights and protections for employee benefit plan participants.[1] In *Edwards v. A.H. Cornell & Son, Inc.*,[2] the Court of Appeals for the Third Circuit considered whether Section 510—ERISA's anti-retaliation, or "whistleblower," provision—protected from termination employees who make unsolicited internal complaints about their employer's ERISA violations.[3] In a matter of first impression, the court held that Section 510 does not protect employees who voluntarily complain to their superiors about the employer's ERISA violations outside the context of an "inquiry" or "proceeding," and, in so doing, split with several of its sister circuits.[4]

In March 2006, Shirley Edwards began working at A.H. Cornell and Son, Inc. (Cornell), a family-owned construction company, as its Director of Human Resources.[5] She participated in Cornell's group health plan, which fell under ERISA's purview.[6] After discovering what she believed to be multiple ERISA violations committed by Cornell, Edwards notified her supervisor of the violations and her objections to them.[7] Cornell terminated Edwards shortly

1. *See* 29 U.S.C. §§ 1011-1014, 1021, 1025-1026, 1053-1059 (2006 & Supp. III 2009) (describing ERISA's various standards and protections). Congress enacted ERISA, in part, because it found that:

> the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial . . . that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities . . . that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries . . . that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans . . . .

29 U.S.C. § 1001 (2006).

2. 610 F.3d 217 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 1604 (2011).

3. *See id.* at 220 (outlining "sole issue on appeal"). Black's Law Dictionary defines a whistleblower as "[a]n employee who reports employer wrongdoing to a governmental or law-enforcement agency." BLACK'S LAW DICTIONARY 1734 (9th ed. 2009).

4. 610 F.3d at 225-26. 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" ERISA. 29 U.S.C. § 1140 (2006).

5. 610 F.3d at 218.

6. *Id.*

7. *Id.* at 219. Among Cornell's alleged violations were administering the group plan on a discriminatory

thereafter, an action Edwards believed was a direct result of her complaints about the alleged ERISA violations.[8]

Edwards filed suit in federal court approximately one month later, asserting that Cornell violated her rights under Section 510.[9] Cornell answered with a motion to dismiss for failure to state a claim, arguing Edwards's internal complaints were not protected under Section 510.[10] Persuaded by precedent from the Second Circuit, the district court granted Cornell's motion to dismiss, reasoning that Section 510 only protects employees who give information during an "inquiry" or "proceeding," neither of which, according to the court, accurately described Edwards's actions.[11] Edwards appealed that decision, arguing that unsolicited internal complaints were protected under Section 510.[12]

For many years, police officers in England blew their whistles when they observed the commission of a crime in order to alert the public to the existence of danger, a practice from which the name "whistleblower" is derived.[13] In an employment context, "internal" whistleblowers are employees who report to their superiors suspected or observed wrongdoing within the organization; however, many potential whistleblowers do not report misconduct because they fear their employer will retaliate by terminating their employment.[14] In 1912,

basis, misrepresenting its cost, and providing invalid social security numbers to noncitizens while enrolling them in the group health plan. *Id.*

8. *Id.* Edwards relayed her concerns about Cornell's conduct to her direct supervisor, who Edwards believed was instrumental in effecting her termination shortly thereafter. *Id.*

9. 610 F.3d at 219. In addition to her federal claim, Edwards filed an alternative state claim for wrongful discharge. *Id.*

10. *Id.*

11. *Id.*; *see also* Nicolaou v. Horizon Media, Inc., 402 F.3d 325, 328-31 (2d Cir. 2005) (defining "inquiry" as any gathering of information regardless of formality).

12. 610 F.3d at 219.

13. *See* Winters v. Hous. Chronicle Publ'g Co., 795 S.W.2d 723, 727 (Tex. 1990) (Doggett, J., concurring) (noting historical derivation of term "whistleblower"). In *Winters*, management terminated an at-will employee after the employee reported the illegal activities of his fellow employees. *Id.* at 723 (majority opinion). Knowing he did not fall within any statutory or common-law exceptions to the at-will doctrine, which states that employees can be fired at any time, without cause, the plaintiff asked the Texas Supreme Court to recognize a new exception to protect private employees who report illegal activity. *Id.* at 724. The court declined to do so because such an exception would be too great an intrusion into the employment relationship and could potentially act as a de facto requirement that employers only terminate employees with cause. *Id.* at 724-25 & n.2. In a concurring opinion, Justice Doggett stressed the need for a whistleblower exception to protect against "unscrupulous" employers, because "[o]ften the very act of whistleblowing indicates that governmental regulation has been inadequate to protect the public." *Id.* at 727, 729 (Doggett, J., concurring).

14. *See* Terry Morehead Dworkin & Elletta Sangrey Callahan, *Internal Whistleblowing: Protecting the Interests of the Employee, the Organization, and Society*, 29 AM. BUS. L.J. 267, 268 (1991) (defining concept of internal whistleblower and describing its societal importance). Internal whistleblowers are members of an organization who report the alleged misconduct to other members of the organization—typically their superiors—in contrast to external whistleblowers who report the alleged misconduct to third parties. *See id.* Some academics contend that external whistleblowers often have more success than internal whistleblowers at changing organizational practices and also experience more retaliation from employers. *See* Terry Morehead Dworkin & Melissa S. Baucus, *Internal vs. External Whistleblowers: A Comparison of Whistleblowering Processes*, 17 J. BUS. ETHICS 1281, 1295 (1998) (reporting results of empirical study suggesting external

the federal government passed the first anti-retaliation law to protect whistleblowers, acknowledging that various state common-law wrongful termination protections were insufficient for at-will employees.[15] Since that time, Congress has passed more federal laws protecting whistleblowers from retaliation—including ERISA and the Sarbanes-Oxley Act—suggesting that public concern for whistleblower protection has grown over time.[16]

ERISA often conflicts with, and preempts, relevant state laws because the federal government designed ERISA to be consistently applied in each state.[17] Although state laws that "relate to" benefit plans covered by ERISA are preempted by it, some courts contend that employees whose activity is not

whistleblowers more effective than internal). Federal civilian workforce surveys imply that most employees are reluctant to disclose misconduct because they either fear retaliation or believe their disclosure will be ineffective. *See* Elaine Kaplan, *The International Emergence of Legal Protections for Whistleblowers*, J. PUB. INQUIRY, Fall/Winter 2001, at 37, 42 (highlighting preference of most potential whistleblowers to remain silent). The most common reasons that observers of workplace misconduct remain silent are the fear of loss of relationships and privacy, worries about having insufficient evidence, and fear of unspecified negative consequences. *See generally* Mary Rowe et al., *Dealing with—or Reporting—"Unacceptable" Behavior*, 2 J. INT'L OMBUDSMAN ASS'N, no. 1, 2009 (exploring sociological and behavioral reasons why some potential whistleblowers remain silent and others disclose).

15. *See* Lloyd-La Follette Act, ch. 389, § 6, 37 Stat. 555 (1912) (current version at 5 U.S.C. §§ 5595, 7101-7102, 7211, 7501 (2006)), *amended by* Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111. The Lloyd-La Follette Act provided certain protections to federal government employees, including the right to furnish information to Congress and other governmental offices without interference, and to be free from terminations without just cause. 5 U.S.C. §§ 7102, 7211 (2006). Unless preempted by federal legislation, private employees generally rely on state laws to pursue claims for wrongful termination by former employers who the employees felt retaliated against them for disclosing organizational misconduct. *See* King v. Marriot Int'l Inc., 337 F.3d 421, 427-28 (4th Cir. 2003) (mentioning existence of state-law remedies applicable for situations not preempted by ERISA).

16. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 806(a), 116 Stat. 745, 802-04 (codified as amended at 18 U.S.C. § 1514A (2006 & Supp. IV 2010)) (providing significant remedies against retaliation for whistleblowing corporate employees); Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841-49 (codified at 15 U.S.C. § 78u-6 (Supp. IV 2010)) (establishing program whereby whistleblowers whose disclosures lead to successful enforcement action receive portion of settlement); *see also supra* notes 1-4 and accompanying text (describing elements and purpose of ERISA and Section 510). Enacted in response to public outrage over corporate scandals, the Sarbanes-Oxley Act of 2002 has been described by scholars as "one of the most protective anti-retaliation provisions in the world." *See* Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 65 (2007) (attempting to prove through empirical analysis why Sarbanes-Oxley Act of 2002 provides insufficient protection).

17. 29 U.S.C. § 1144 (2006). ERISA's preemption clause states, in relevant part: "[T]he provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." *Id.* ERISA's preemption clause was designed to foster the uniform administration of ERISA plans by creating a national standard for regulation and enforcement mechanisms, largely to prevent various state laws from acting as de facto regulations of ERISA. *See* N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 657 (1995) (holding preemption clause avoids "multiplicity of regulation" and helps with "nationally uniform administration" of benefit plans); Ingersoll–Rand Co. v. McClendon, 498 U.S. 133, 142 (1990) (highlighting ERISA preemption as solution to "disruptive" potential for conflict with substantive state laws); *see also* David Angueira & David Conforto, *Without a Remedy: The Massachusetts Whistleblower's Brush with ERISA*, 39 SUFFOLK U. L. REV. 955, 956-58 (2006) (highlighting history, judicial treatment of, and rationale behind ERISA's preemption clause).

protected by ERISA are nonetheless allowed to bring state law claims.[18] However, courts disagree over what activities fall under ERISA's purview, evidenced by the existing circuit split regarding the status under ERISA of voluntary or unsolicited internal complaints, with the Courts of Appeals for the Fifth and Ninth Circuits considering them protected activities and the Courts of Appeals for the Second and Fourth Circuits taking the opposite view.[19]

Section 510 only protects information given by whistleblowers during an "inquiry or proceeding," and courts disagree about what those words mean.[20] For example, in *Nicolaou v. Horizon Media, Inc.*,[21] the Second Circuit held that, to constitute an inquiry, internal complaints need to have been solicited from the employee by someone at the company—preferably a manager—who was in the process of "gathering information," even if only informally.[22] In contrast, in *Hashimoto v. Bank of Hawaii*,[23] the Ninth Circuit noted that the "normal first step" in an inquiry occurs when an employee notifies an employer of misconduct, and that denying protection to unsolicited internal complaints would strip Section 510 of its "clearly" intended effect of protecting whistleblowers, thereby discouraging the whistleblower "before the whistle is blown."[24] As a result, the success of a whistleblower's Section 510 claim has

18. *See* Nicolaou v. Horizon Media, Inc., 402 F.3d 325, 327, 330 (2d Cir. 2005) (holding unsolicited internal complaint not protected by Section 510); King v. Marriott Int'l Inc., 337 F.3d 421, 427-28 (4th Cir. 2003) (holding unsolicited internal complaints not protected by Section 510 and thus not preempted by it). In *Ball v. Memphis Bar-B-Q Co.*, the court declined to "expand" the applicability of the anti-retaliation provision of the Fair Labor Standards Act (FLSA) to "intra-company complaints." 228 F.3d 360, 364 (4th Cir. 2000); *see also* 29 U.S.C. § 215(a)(3) (2006) (outlining FLSA's anti-retaliation protections for employees who report FLSA violations).

19. *Compare* Anderson v. Elec. Data Sys. Corp., 11 F.3d 1311, 1314 (5th Cir. 1994) (holding claim by employee who offered unsolicited internal complaints fell "squarely within the ambit" of Section 510), *and* Hashimoto v. Bank of Haw., 999 F.2d 408, 411-12 (9th Cir. 1993) (holding state-law claim completely preempted by ERISA and remanding for recharacterization as federal claim), *with* Nicolaou v. Horizon Media, Inc., 402 F.3d 325, 330 (2d Cir. 2005) (holding Section 510 requires more formality than written or spoken complaints to supervisor), *and* King v. Marriott Int'l Inc., 337 F.3d 421, 427-28 (4th Cir. 2003) (holding state-law claim not preempted because internal complaints not protected by Section 510).

20. *Compare* King v. Marriott Int'l Inc., 337 F.3d 421, 427-28 (4th Cir. 2003) (holding Section 510's phrase "inquiry or proceeding" limited to formal, legal, or administrative processes), *with* Nicolaou v. Horizon Media, Inc., 402 F.3d 325, 327-30 (2d Cir. 2005) (refusing to require formality for classification of internal complaint as "inquiry"), *and* Anderson v. Elec. Data Sys. Corp., 11 F.3d 1311, 1313-14 (5th Cir. 1994) (holding failure of Section 510 to protect internal complaints would inhibit effectiveness of anti-retaliation provision).

21. 402 F.3d 325 (2d Cir. 2005).

22. Nicolaou v. Horizon Media, Inc., 402 F.3d 325, 327-30 (2d Cir. 2005). In *Nicolaou*, the court looked to several dictionaries to discover what Congress meant by the terms "inquiry" and "proceeding"—ultimately determining that the word "inquiry" was less formal than the word "proceeding" and, because Congress chose to include it in Section 510, the "informal gathering of information" was protected activity because it constituted an inquiry. *Id.* at 328-29. Thus, the Second Circuit held that if the plaintiff could "demonstrate that she was contacted to meet with [Horizon's President] in order to give information about the alleged underfunding of" Horizon's pension plan due to the payroll issue, her actions would "fall within the protection of Section 510." *Id.* at 330.

23. 999 F.2d 408 (9th Cir. 1993).

24. *See* Hashimoto v. Bank of Haw., 999 F.2d 408, 411 (9th Cir. 1993) (noting, in dicta, Section 510

often turned upon how narrowly or broadly courts construe the phrase "inquiry or proceeding," and the related issue of when an inquiry or proceeding begins.[25]

In *Edwards v. A.H. Cornell & Son, Inc.*, the Third Circuit addressed whether Section 510's requirement that information be given during an "inquiry or proceeding" provides protection for employees who make unsolicited internal complaints.[26] Recognizing the existing circuit split over this issue, and noting the lack of controlling precedent, the court relied heavily on Section 510's "plain meaning."[27] In particular, the court concurred with the Fourth and Second Circuit that unsolicited statements, without more, do not constitute an "inquiry" because an inquiry is generally defined as a "request for information," and Edwards did not allege that her employer sought any information from her.[28] Additionally, the court held that Edwards's complaint was not part of a "proceeding" because that term relates to a lawsuit or other means of seeking redress and no evidence suggesting Edwards initiated such a "formal action" existed.[29]

The *Edwards* court stressed that the existence of different statutes with broader whistleblower protections than Section 510 meant that Congress could have extended similar protections under ERISA, but "declined to do so."[30]

clearly meant to protect whistleblowers). In *Hashimoto*, the plaintiff-employee filed suit under a Hawaii whistleblower statute and the employer-bank removed the case to federal court, arguing that the state-law claim was preempted by Section 510. *Id.* at 409-10 (discussing facts and procedure of case). Addressing only the preemption issue and not tasked with substantively interpreting Section 510's language, the court noted, in dicta, that Section 510 "may be fairly construed to protect a person in Hashimoto's position if, in fact, she was fired because she was protesting a violation of law in connection with an ERISA [benefit] plan." *Id.* at 411. In *Anderson v. Elecronic Data Systems Corp.*, the Fifth Circuit echoed the sentiments of the Ninth Circuit, holding that Section 510 was clearly meant to protect the rights of employees discharged for "providing information" relating to the exercise of and interference with ERISA rights. *See* 11 F.3d 1311, 1314 (5th Cir. 1994) (broadly construing Section 510's phrase "inquiry or proceeding").

25. *See supra* notes 20-24 and accompanying text (providing several examples of how various circuit courts interpret Section 510's language); *see also* 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, 528-35 (2010) (outlining current circuit splits regarding Section 510). Barclay-Strobel argues that three circuits employ a narrow, "textualist" approach to interpreting Section 510—an approach that defines internal complaints as unprotected activity. *See* Barclay-Strobel, *supra*, at 534; *see also* 610 F.3d at 220-22 (explaining Fifth and Ninth Circuits reached "opposite" conclusions compared to Second and Fourth Circuits).

26. *See* 610 F.3d at 220 (articulating "sole issue on appeal").

27. *See id.* at 220-23 (explaining various analytical steps supporting court's emphasis on statutory language).

28. *Id.* at 223. The *Edwards* court looked to Black's Law Dictionary to determine the definitions of the terms "inquiry" and "proceeding." *Id.* Plaintiff Edwards argued that her complaint should be protected because it may have eventually resulted in an inquiry. *Id.* The court dismissed that argument, however, instead contending that such a possibility only "underscores the fact that the complaints . . . do not constitute an inquiry." *Id.*

29. *Id.*

30. *See* 610 F.3d at 224-26 (distinguishing Section 510's language from that of other statutes' whistleblower provisions). In a previous case, the Third Circuit determined that the term "proceeding" was ambiguous as used in another statute; however, the court emphasized that the term was only ambiguous within that particular statutory context, and cautioned against its "rote application" to other statutes. *Id.* at 225.

Although conceding that ERISA is a remedial statute whose protections for employees should be construed liberally, the court noted that such a posture does not allow it to ignore "clear statutory language" evidencing congressional intent.[31] In dissent, Justice Cowen argued that the phrase "inquiry or proceeding" is ambiguous, and therefore considering Congress's intent is proper.[32] Determining that the majority did not give the "broad considerations" behind ERISA's whistleblower provision sufficient deference, Justice Cowen contended that protecting employees who make unsolicited internal complaints about potential ERISA violations is "essential" to the "whole ERISA scheme," and that the majority adopted an "ultimately unsustainable interpretation" by failing to afford such protection.[33]

The Court of Appeals for the Third Circuit was too rigid in its analysis of Section 510's language, relying heavily on rote definitions while ignoring the broader congressional purpose behind Section 510—the protection of whistleblowers.[34] It is difficult to imagine how an inquiry into potential ERISA violations would begin in practice, if employers are allowed to immediately terminate with impunity employees who bring alleged misconduct to the employer's attention.[35] Thus, in addition to failing to protect unsolicited, good-faith whistleblowers, the *Edwards* court arguably frustrated the larger purpose behind the entire ERISA scheme because employers can simply deny benefit-plan participants their promised benefits and circumvent remedial consequences with anticipatory discharges of employees who become aware of violations.[36]

The court was correct to ignore prior case law regarding different whistleblower statutes and instead base its holding on Section 510's meaning.[37]

31. *See id.* at 223-24 (acknowledging likely construction in favor of plan participants if Section 510's language ambiguous). The court further stressed that any speculation on its part into Congress's intent and purpose when enacting Section 510 was impermissible, given Section 510's unambiguous language. *Id.* at 224.

32. *See id.* at 226 (Cowen, J., dissenting) (lamenting majority's failure to protect category of conduct Section 510 enacted to protect).

33. *Id.* at 227-28. Justice Cowen further contended that the majority's "narrow" interpretation of the term "inquiry" was questionable and likely difficult to apply, as it is often unclear, in practice, precisely when an "inquiry" begins and what particular statements, questions and answers comprise an inquiry. *See id.* (providing examples of how majority's interpretation could prove "unworkable in certain circumstances").

34. *See* 610 F.3d at 223-24 (majority opinion) (articulating reasons for ignoring congressional intent when statutory language unambiguous); *see also supra* notes 28, 33 and accompanying text (discussing differing views of dissent and majority about Section 510's intended scope).

35. *See* 610 F.3d at 226-29 (Cowen, J., dissenting) (noting employers' ability to terminate unsolicited whistleblowers and predicting confusion resulting from majority's narrow interpretation); *see also supra* note 24 and accompanying text (describing unsolicited complaints as crucial first step in inquiry surrounding potential ERISA violations). *But see* King v. Marriott Int'l Inc., 337 F.3d 421, 427-28 (4th Cir. 2003) (limiting phrase "inquiry or proceeding" to formal processes).

36. *See supra* notes 1-4, 33 and accompanying text (defining and discussing Section 510's relationship with ERISA's purpose of protecting plan participants). In concluding his dissent, Justice Cowen noted that the "expansive purposes and principles" behind ERISA and, in particular, Section 510, require protection for unsolicited internal complaints. 610 F.3d at 231 (Cowen, J., dissenting).

37. *See* 610 F.3d at 225 (majority opinion) (noting holding grounded "in the plain meaning of Section

Nevertheless, as both the majority and Justice Cowen correctly observed, the statutory interpretation process encompasses consideration of both statutory language and any "clearly expressed legislative intent to the contrary."[38] Thus, the *Edwards* court was incorrect in ignoring Congress's general intent to protect benefit plan participants and specific intent to protect whistleblowers, because considering those purposes is part of the statutory interpretation process and, moreover, would have likely led to the conclusion that Section 510's language is ambiguous.[39]

The existing circuit split may have the effect of silencing *a priori* potential whistleblowers who may fear retaliatory discharges by their employers.[40] Even if the Supreme Court of the United States eventually weighs in on Section 510 as it relates to the protection of unsolicited internal complaints, Congress can and should amend Section 510 to clarify the phrase "inquiry or proceeding."[41] In light of growing public concern about corporate malfeasance, as reflected in several pieces of recent legislation enacted to provide robust protection to corporate whistleblowers, Congress should ensure that whistleblowers are protected from anticipatory discharge by explicitly including unsolicited internal complaints among Section 510's protected activities.[42]

In *Edwards v. A.H. Cornell & Son, Inc.*, the Third Circuit examined whether Section 510 of ERISA protects from retaliatory discharge employees who make unsolicited internal complaints about their employer's potential ERISA violations. Ignoring the broader purpose behind ERISA—a remedial law Congress enacted to protect benefits promised to plan participants—the court instead focused solely on the statute's "plain meaning" when analyzing the issue. Because the internal complaints at issue were neither made in response

510," not prior cases addressing other whistleblower statutes); *see also supra* note 30 and accompanying text (warning against applying interpretation methods used for other statutes to Section 510).

38. *See* 610 F.3d at 226 (Cowen, J., dissenting) (classifying statutory language not dispositive if "clearly expressed legislative intention to the contrary" exists). *But see id.* (majority opinion) (contending clear statutory language precludes inquiry into legislative intent).

39. *See supra* note 38 (comparing *Edwards* majority and dissent's approaches to statutory construction). Although the *Edwards* court noted that unambiguous statutory language is "ordinarily" conclusive, it also observed that "clearly expressed" contrary legislative intent may be considered. *See* 610 F.3d at 222 (quoting Wolk v. Unum Life Ins. of Am., 186 F.3d 352, 355 (3d Cir. 1999)). Thus, in light of the *Edwards* court's awareness of the existing circuit split over Section 510 at the time it heard the case on appeal, and its acknowledgement that ERISA is a broad remedial statute that should be construed liberally in favor of plan participants, there existed ample evidence to support Justice Cowen's contention that the phrase "inquiry or proceeding" is ambiguous and that further investigation into legislative intent is proper. *See* 610 F.3d at 220-24 (explaining circuit split and deference courts typically afford plan participants in light of ERISA's purpose); *see also supra* notes 1-4 and accompanying text (describing ERISA and Section 510's relation to protecting plan participants).

40. *See supra* note 14 and accompanying text (observing many potential whistleblowers do not report misconduct because of fear of employer retaliation).

41. *See supra* note 30 and accompanying text (implying congressional power to award or deny protections through statutes like ERISA and amendments).

42. *See supra* notes 15-16 and accompanying text (tracing history of whistleblower statutes including those passed recently in response to high-profile scandals).

to any request for information nor part of any legal proceeding, the court held that they were not protected by Section 510 due to its requirement that information be given during an "inquiry or proceeding." In so holding, the court frustrated ERISA's remedial intent, essentially allowing employers to circumvent ERISA's requirements by discharging employees who become aware of, and complain about, ERISA violations. In light of this frustration and the existing circuit split over Section 510's precise scope and meaning as it relates to internal complaints, Congress should clarify the issue by amending Section 510 so that it unequivocally provides this needed protection.

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