



# Workplace Whistleblower

*Perspectives on whistleblower situations that employers frequently face*

## ERISA Has a Whistleblower Provision? Yep.

*By Ada W. Dolph and Robert T. Szyba*

Most employee benefits practitioners are familiar with ERISA Section 510, 29 U.S.C. § 1140, which is frequently used by participants to assert claims that they were terminated in order to prevent them from obtaining certain benefits under an employee benefit plan. A lesser known part of Section 510, however, is its second clause, which protects ERISA whistleblowers from retaliation after engaging in certain protected whistleblowing activity. It states that “[i]t 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 [the Act].” ERISA, 29 U.S.C. § 1140. A circuit split regarding the meaning of this second clause has emerged, and employers and benefit plans should be aware that in some jurisdictions, even unsolicited internal complaints could form the basis for a claim under ERISA Section 510.

More recently, however, in *Sexton v. Panel Processing, Inc.*, \_\_\_ F.3d \_\_\_, 2014 WL 1856692 (6th Cir. May 9, 2014), the Sixth Circuit concluded otherwise, finding that a plaintiff’s one-time, unsolicited complaint about a possible ERISA violation did not constitute “giv[ing] information . . . in any inquiry” as required to be protected under Section 510. Plaintiff Sexton and one other trustee of an employee retirement plan had been removed as trustees after actively campaigning for the election of two board candidates that the company ultimately refused to seat. Subsequently, Sexton sent an email to the chairman of the board of directors asserting that the refusal to seat the board candidates and his removal as trustee was a violation of ERISA and state law. He threatened that if the violations were not “remedied,” he would go to the Department of Labor and the Michigan Department of Licensing and Regulatory Affairs. Notably, neither the company nor Sexton took any further action regarding his email. About six months after the email, Sexton was terminated. He sued, alleging that he was terminated in retaliation for sending the email, which he argued constituted protected conduct under ERISA Section 510.

In analyzing the language of Section 510, the Sixth Circuit reasoned that generally there are two types of anti-retaliation provisions: (1) opposition clauses, protecting employees who oppose, report, or complain about unlawful practices; and (2) participation clauses, shielding employees from retaliation for participating, testifying, or giving information in inquiries, investigations, proceedings, or hearings. Other laws might contain one of these provisions, with many laws containing both. The court found it meaningful that ERISA Section 510 contains only a participation clause, given that Congress had included both types of provisions with numerous other statutes enacted both before and after ERISA. *Sexton*, 2014 WL 1856692, at \*3-4 (citations omitted). The court concluded that Congress had enacted this second clause with the intent of preventing interference with inquiries and proceedings, as opposed to protecting all persons who disclosed violations of the Act.

The Sixth Circuit found that its more narrow reading of Section 510’s second clause was consistent with precedent in the Second, Third and Fourth Circuits. See *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 329 (2d Cir. 2005); *Edwards v. A.H. Cornell & Son*, 610 F.3d 217, 225-26 (3d Cir. 2010); *King v. Marriot Int’l, Inc.*, 337 F.3d 421, 428 (4th Cir. 2003). However, the Court distinguished the Seventh Circuit’s conclusion in *George v. Junior Achievement of Cent. Ind., Inc.*, 694 F.3d 812, 817 (7th Cir. 2012) that Section 510 covers any complaint about ERISA that either asks or answers a question, on the narrow grounds that Sexton’s email “did neither.”

Judge White wrote a lengthy dissent, stating that she would have followed George to conclude that “unsolicited internal employee grievances [are protected] regardless whether the employer or employee initiated the ‘inquiry.’” Judge White also noted additional circuit opinions from the Fifth and Ninth Circuits that she concluded supported her broader reading of Section 510. See *Hashimoto v. Bank of Hawaii*, 999 F.2d 408 (9th Cir. 1993); *Anderson v. Electronic Data Systems Corp.*, 11 F.3d 1311 (5th Cir. 1994). The Department of Labor filed an amicus brief which had also urged that the broader reading be applied.

Given the emerging circuit split on this issue and the Department of Labor’s advocacy in this area, employers should be mindful that even unsolicited, internal complaints involving ERISA could be found to be protected for the purposes of ERISA Section 510 claims.

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